SUPREME COURT, U.S.

JUN 2 1957

JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM—1956

No. ~~1118~~ 218

MASSEY-HARRIS-FERGUSON LIMITED,

*Petitioner,*

*against*

HON. MARION SPEED BOYD, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI.

## MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT.

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# INDEX


| | PAGE |
|---|---|
| **PETITION FOR CERTIORARI** | 1 |
| OPINIONS BELOW | 3 |
| JURISDICTION | 3 |
| QUESTIONS PRESENTED | 3 |
| STATUTES INVOLVED | 4 |
| STATEMENT | 4 |
| Commencement of the Action and Service of Process | 6 |
| Canadian Company's Motion to Vacate Service | 6 |
| Opinion of the District Court on the Motion to Quash Service | 7 |
| Opinion of the Court of Appeals | 9 |
| REASONS FOR GRANTING THE WRIT | |
| I. The Ruling of the District Court that the Canadian Company is Subject to Service Because of the Activities of its American Subsidiary Is Clearly Contrary to Decisions of this Court and to the Requirements of Due Process and Is of Great Public Importance by Reason of its Impact and International Commercial Relationships | 10 |
| The Conflict with Decisions of this Court | 10 |
| The District Court's Attempt to Distinguish the *Cudahy* Case | 13 |

PAGE

The District Court's Interpretation of the Standard for Service under the Clayton Act 15

The District Court's Reliance on the *Scophony* Case 16

Certiorari Should Be Granted to Review This Question 18

II. In View of the Clear Error of the District Court, the Public Importance of the Question Decided, and the Serious Prejudice to the Petitioner, the Court of Appeals Should Have Granted the Petition for Mandamus. Its Failure to Do So Compounds the Error of the District Court and Intensifies Its Importance and Effect 19

The Appropriateness of the Extraordinary Writ to Review an Erroneous Assertion of Jurisdiction 20

The Effect of the Ontario "Business Records Protection Act" 21

Other Factors Supporting the Use of the Extraordinary Writ 24

III. The Ruling of the Court of Appeals that the Legal Difficulty of a Jurisdictional Question is a Sufficient Ground for Denying the Extraordinary Writ Should Be Reversed by this Court in the Interest of Efficient Judicial Administration 26

Conclusion 29

**MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR OTHER APPROPRIATE WRIT** 31

## Appendix.


| | PAGE |
|---|---|
| Section 12 of the Clayton Act (15 U. S. C. 22) | 1a |
| All Writs Act (28 U. S. C. § 1651 (a)) | 1a |
| Opinion of the Court of Appeals for the Sixth Circuit | 2a |
| Judgment of the Court of Appeals | 7a |
| Opinion of Judge Marion Speed Boyd of January 3, 1957 | 9a |
| Order of Judge Boyd of January 4, 1957 | 16a |
| Statement of Premier of Ontario to Ontario Legislature, October 27, 1947 | 17a |
| Sections of the Revised Statutes of the Province of Ontario (Ch. 44, 1950) Relating to Removal of Business Records | 21a |
| Complaint | 22a |
| Motion to Quash and Vacate Service | 40a |
| Affidavit of Lee J. Wolf in Support of Motion to Quash and Vacate Service | 41a |
| Affidavit of C. Norman Appleton in Support of Motion to Quash and Vacate Service | 44a |
| Affidavit of V. N. Detling in Support of Motion to Quash and Vacate Service | 48a |
| Affidavit of Kenneth G. House in Support of Motion to Quash and Vacate Service | 49a |

## CITATIONS


PAGE

*Cases:*

*Anderson v. British Overseas Airways Corp.*, 144 F. Supp. 543 (S. D. N. Y. 1956) ..... 15

*Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379 ..... 20, 21, 24

*Bergholf v. Hudson Motor Car Co.*, 124 F. Supp. 716 (D. Minn. 1954) ..... 15

*Cannon Manufacturing Co. v. Cudahy Co.*, 267 U. S. 333 ..... 11, 13, 15, 16

*Chicago, R.I. & P.R. Co. v. Igoe*, 212 F. 2d 378, 380 (7th Cir. 1954) ..... 21

*Comfort Equipment Co. v. Steckler*, 212 F. 2d 371 (7th Cir. 1954) ..... 21

*Dam v. General Electric Co.*, 111 F. Supp. 342 (E. D. Wash. 1953) ..... 15

*DeBeers Consolidated Mines, Ltd. v. United States*, 325 U. S. 212 ..... 21

*Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 ..... 14

*Echeverry v. Kellogg Switchboard & Supply Co.*, 175 F. 2d 900 (2nd Cir. 1949) ..... 15

*Ex parte Chicago, Rock Island & Pacific Railway Co.*, 255 U. S. 273 ..... 29

*Ex parte Kawato*, 317 U. S. 69 ..... 32

*Ex parte Muir*, 254 U. S. 522 ..... 28

*Ex parte Peru*, 318 U. S. 578 ..... 25, 32

*Ex parte Skinner & Eddy Corp.*, 265 U. S. 86 ..... 24

*Ex parte United States*, 287 U. S. 241 ..... 32

*Fergus Motors, Inc. v. Standard-Triumph Motor Co.*, 130 F. Supp. 780 (S. D. N. Y. 1955) ..... 13, 15

*Gravely Motor Plow Co. v. H. V. Carter Co.*, 193 F. 2d 158 (9th Cir. 1951) ..... 11, 15

PAGE

*Harris* v. *Deere and Company*, 223 F. 2d 161 (4th Cir. 1955) ..... 11, 13, 15

*In the Matter of N. L. R. B.*, 304 U. S. 486 ..... 21

*In re Grand Jury Subpoenas Duces Tecum*, 72 F. Supp. 1013 (S. D. N. Y. 1947) ..... 23

*International Shoe Co.* v. *Washington*, 326 U. S. 310 ..... 14, 15

*LaBuy* v. *Howes Leather Company, Inc.*, 352 U. S. 249 ..... 20, 21

*Lauritzen* v. *Larsen*, 345 U. S. 571 ..... 18

*Lawlor* v. *National Screen Service Corp.*, 10 F. R. D. 123 (E. D. Pa. 1950) ..... 13

*LeVecke* v. *Griesedieck Western Brewery Co.*, 233 F. 2d 772 (9th Cir. 1956) ..... 16

*McCullough* v. *Cosgrave*, 309 U. S. 634 ..... 32

*People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79 ..... 14, 16

*Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364 ..... 13

*Roche* v. *Evaporated Milk Association*, 319 U. S. 21 ..... 20, 21

*Shedd* v. *Willys Motors, Inc.*, 143 F. Supp. 391 (S. D. N. Y. 1956) ..... 15

*Stetson China Co.* v. *D. C. Andrews & Co.*, 9 F. R. D. 135 (N. D. Ill. 1948) ..... 15

*Terry Carpenter Ltd.* v. *Ideal Cement Co.*, 117 F. Supp. 441 (D. Neb. 1954) ..... 13

*United States Alkali Export Association* v. *United States*, 325 U. S. 196 ..... 20, 21, 24

*United States* v. *Scophony Co.*, 333 U. S. 795 ..... 14, 16, 17, 18

PAGE

*Statutes:*

15 U. S. C. §22 (1952) ..... 2, 3, 4, 6, 13

Revised Statutes of Ontario, 1950, c. 44 ..... 22

Economic Competition Bill (The Netherlands, Mar. 14, 1956) ..... 23

28 U. S. C. §1651 (1952) ..... 3, 4, 20

*Miscellaneous:*

Friedmann, Antitrust Laws—A Comparative Symposium 278 (1956) ..... 23

H. R. 7339, 98 Cong. Rec. 3332 (82d Cong., 2d Sess. 1952) ..... 25

H. R. 391, 99 Cong. Rec. 61 (83d Cong., 1st Sess. 1953) ..... 25

H. R. 642, 101 Cong. Rec. 44 (84th Cong., 1st Sess. 1955) ..... 25

6 Moore, Federal Practice 68-72 (2d ed. 1953) ..... 27

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*v.*

HON. MARION SPEED BOYD, UNITED STATES JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE,

Respondent.

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## PETITION FOR A WRIT OF CERTIORARI.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit entered on April 12, 1957, or in the alternative that this Court grant Petitioner's motion for leave to file a petition for a writ of mandamus or other appropriate writ directed to the Honorable Marion Speed Boyd, United States District Judge for the Western District of Tennessee.

The judgment below denied a petition for a writ of mandamus or prohibition or other appropriate writ. By denying the petition, the Court of Appeals refused to review the District Court's order sustaining its jurisdiction against Petitioner's motion to quash service, although the Court of Appeals expressly found that the lower court's ruling was doubtful in fact and in law.

Petitioner, a Canadian corporation, based its motion in the District Court to quash service upon the fact that it is not found and transacts no business in the United States within the meaning of Section 12 of the Clayton Act, 38 Stat. 736 (1914), 15 U. S. C. §22 (1952).

By denying the petition for an extraordinary writ, the Court of Appeals requires the Petitioner to defend itself in a complex private antitrust litigation which will involve extensive discovery and other judicial proceedings extending over a long period of time. The District Court is thereby permitted to assert its jurisdiction over a defendant which has never been within the territorial jurisdiction of the United States. Compliance with the orders of the District Court will expose the Petitioner to penal sanctions under the laws of Ontario. Both the language of the statutes involved, and the history of their interpretation by this Court and lower courts establish that such an assertion of jurisdiction was contrary to the intent of Congress.

Unless the judgment of the Court of Appeals is reversed or this Court now issues its own extraordinary writ, Petitioner will be unable to challenge the District Court's ruling until after trial and final judgment. At that time, the harm to Petitioner will no longer be curable. Only by granting its writ of certiorari or extraordinary writ at the present stage of the proceedings can this Court consider the important question of federal procedure raised by the ruling of the Court of Appeals.

Moreover, unless reviewed and reversed promptly, the decision below inevitably will cause serious harm to international commercial relations generally and to the domestic and foreign commerce of the United States.

## Opinions Below.

The opinion of the Court of Appeals is reported at 242 F. 2d 800 and is printed in the appendix at page 2a. The opinion of the District Court is unreported and is printed in the appendix at page 9a.

## Jurisdiction.

The order of the Court of Appeals was entered on April 12, 1957. The jurisdiction of this Court to issue a writ of certiorari to the Court of Appeals is invoked under 28 U. S. C. §1254(1).

The jurisdiction of this Court to issue a writ of mandamus or prohibition or other appropriate writ to the District Court is invoked under 28 U. S. C. §1651(a).

## Questions Presented.

This case presents important questions relating to the antitrust laws, to the jurisdiction of our District Courts in proceedings under such laws, and to the proper use of the extraordinary writs of mandamus and prohibition by the United States Courts of Appeals. The questions are:

1. (a) Where a Canadian corporation transacts no business in the United States, can it be served under Section 12 of the Clayton Act, 38 Stat. 736 (1914), 15 U. S. C. §22 (1952), merely because it has a wholly owned subsidiary which is found and transacts business in the United States? (b) Does service under these circumstances meet the requirements of due process?

2. Where the District Court's erroneous assertion of jurisdiction over a Canadian corporation is contrary to a

jurisdictional statute enacted by Congress and to controlling decisions of this Court and compels the Canadian defendant to defend itself in complicated, lengthy and expensive antitrust litigation and to expose itself to penal sanctions under Canadian law, should not the Court of Appeals issue a writ of mandamus or prohibition?

3. Where the jurisdiction of a District Court is challenged in an antitrust case in which the clearly erroneous assertion of jurisdiction will cause irreparable harm to the defendant, the facts being undisputed and the issues of great public importance, should the Court of Appeals refuse to issue a writ of mandamus merely because the jurisdictional question is difficult as a matter of law?

## Statutes Involved.

The statutes involved are Section 12 of the Clayton Act, 38 Stat. 736 (1914), 15 U. S. C. §22 (1952) and the "All Writs Act," 28 U. S. C. §1651(a). These statutes are printed in full at page 1a of the appendix.

## Statement.

This is a private action in the United States District Court for the Western District of Tennessee seeking relief for alleged violation of the federal antitrust laws.

Defendant Massey-Harris-Ferguson, Inc. (herein the "American Company") is a Maryland corporation organized in 1928. It has since then been a wholly owned subsidiary of Petitioner engaged in manufacturing and selling farm tractors and implements.

Defendant Massey-Harris-Ferguson Limited (herein the "Canadian Company") is a Canadian corporation with its

principal office and records in Toronto, Ontario, Canada. It was the moving defendant before the District Court and the Petitioner before the Court of Appeals and is the Petitioner before this Court.

The American Company for many years has been and is qualified to do business in all 48 states, and, of course, conceded the jurisdiction of the District Court as to it. It manufactures farm machinery at five different plants in the United States, and also purchases equipment from independent suppliers and manufacturers and from its parent corporation. The American Company's own national distribution organization consisted of 19 branches with approximately 2,250 franchised dealers for distribution of certain products and a number of independent distributors with approximately 1,870 franchised dealers for distribution of other of its products.

The business of the Canadian Company, which is a leading manufacturer and seller of farm machinery and implements in Canada and in certain other parts of the world outside of the United States, has been carried on for over 100 years. The Canadian Company has never manufactured products or solicited business in the United States and it has never intended to or actually conducted or transacted business in the United States. Any product of the Canadian Company is available for purchase in the United States only from the American Company, which buys such products from the Canadian Company in Canada and distributes them through its own franchised American channels.

The Canadian Company has never in over 100 years of operation been held by any court or any government or agency thereof of any state or of the United States to be transacting business in the United States in any way whatsoever.

Plaintiffs have been distributors in the Tennessee-Oklahoma area for products sold to them by the American Company. They have never had any direct contractual or other business relations with the Canadian Company.

**Commencement of the Action and Service of Process.**

This action was commenced in the District Court in 1956. Service of process was made upon the two following people: (a) In Memphis, Tennessee, on V. N. Detling, Assistant Branch Manager of the Memphis Branch of the American Company; (b) In Detroit, Michigan, upon Herman Klem, an engineer who was an officer and director of both the American Company and the Canadian Company.*

**Canadian Company's Motion to Vacate Service.**

Shortly thereafter, the Canadian Company appeared specially and moved to quash and vacate the purported service made upon it upon the grounds that it neither was "found" nor "transacted business" in the Western District of Tennessee within the meaning of Section 12 of the Clayton Act (38 Stat. 736 (1914), 15 U. S. C. §22 (1952)) and upon the ground that it was not "found" in Detroit. This motion was based upon the following admitted facts:

(a) The Canadian Company was never and is not now a resident of the Western District of Tennessee;

(b) The Canadian Company was not and is not now qualified to do business in the State of Tennessee;

(c) The Canadian Company has never maintained any office or place of business or kept any books or records in the Western District of Tennessee;

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* Attempted service on the Canadian Company by service on a third person in New York City was ruled below to have been ineffective, without opposition from plaintiffs.

(d) The Canadian Company has never held meetings of its board of directors or stockholders in the Western District of Tennessee and none of its officers or directors are residents there;

(e) The Canadian Company has never maintained any bank accounts in the Western District of Tennessee;

(f) The Canadian Company has never authorized or paid for any listing in any directories published in the Western District of Tennessee;

(g) The Canadian Company has never done any advertising in any media published in the Western District of Tennessee;

(h) The Canadian Company has never solicited any orders or made any sales in the Western District of Tennessee nor has it made any collections of any accounts there;

(i) The Canadian Company has never appointed anyone as its agent in the Western District of Tennessee for any purpose whatsoever;

(j) All purchases of merchandise from the Canadian Company by its American subsidiary were and are handled as follows: orders for merchandise are placed by the American Company with the Canadian Company and are shipped f.o.b. the Canadian Company's manufacturing plants in Canada upon instructions issued to it by the American Company in the United States.

**Opinion of the District Court on the Motion to Quash Service.**

The plaintiffs were permitted by the District Court to take extensive depositions of a number of officers and employees of the American Company on the jurisdictional question. They were also permitted to obtain discovery

under Rule 34 of numerous documents of that company relevant on the jurisdictional question. The depositions and documents thus adduced were in the record before the District Court on the motion to quash service. All these documents and depositions were in the record before the Court of Appeals.

At the conclusion of the argument on the motion, the District Court held that the American Company was merely an adjunct or instrumentality of the Canadian Company and that for all intents and purposes there was really only one corporation. Service in any one of the forty-eight states where the American subsidiary did business was therefore sufficient to obtain jurisdiction over the Canadian parent. The District Court did not discuss and rejected without substantial consideration the facts that the corporate form of the American Company has been strictly maintained and that the American Company always has been and is a distinct economic entity which carries on extensive business activities separate from those of its parent.

In reaching its conclusion, the District Court relied on the facts that some farm equipment had been shipped into Tennessee from the Canadian Company to the American Company, that there are some interlocking officers and directors between the American Company and the Canadian Company, that annual statements of the Canadian Company occasionally referred to the American Company as a "division" or "branch", and that in several instances engineers were sent from Canada to Tennessee for seasonal testing of equipment being developed and to conduct experimental farm work and were advanced expense money by the American Company.

The Petitioner conceded all of these facts, which establish no more than that the ordinary parent-subsidiary relationship existed between the Canadian Company and the

American Company. The record before the District Court disclosed no other facts which provided any greater or additional support for the Court's conclusion. The legal question was therefore sharply defined.

Relying on these facts alone, the District Court concluded that "the whole structure of the Canadian Company is in the Court's opinion, that of a very large enterprise with full control of its many operations, including the Memphis office in this judicial district," and that "the American Company operates wholly under the control and dominion of the Canadian Company." From this the Court concluded that the activities of the subsidiary within its jurisdiction were those of the parent and were sufficient to support service.

**Opinion of the Court of Appeals.**

The Canadian Company petitioned the United States Court of Appeals for the Sixth Circuit for a writ of mandamus or prohibition or other appropriate writ to review the ruling of the lower court. Petitioner contended that the jurisdictional ruling of the District Court was clearly erroneous, that it encroached upon the sovereignty of Canada and would expose Petitioner or its officers to penalties under the laws of Ontario, that the ordinary appellate remedy after final judgment would not be adequate since the Petitioner would suffer irreparable injury from the action in the District Court if it was required to proceed with the defense of the case, and that mandamus or prohibition is an appropriate remedy where a District Court erroneously asserts jurisdiction over a Canadian corporation clearly not subject to its jurisdiction.

The Court of Appeals in denying the writ held that the jurisdictional question "is a difficult one, and the ruling doubtful, both as a matter of fact and in point of law."

The only reasons stated for denying the petition were the difficulty of the jurisdictional question and the possibility that the District Court might again take up the question and that additional facts might be brought out in the course of the proceeding. The Court stated that the District Court's ruling should therefore not be reviewed until after final judgment.

## REASONS FOR GRANTING THE WRIT.

### I.

### The Ruling of the District Court that the Canadian Company is Subject to Service Because of the Activities of its American Subsidiary is Clearly Contrary to Decisions of This Court and to the Requirements of Due Process and is of Great Public Importance by Reason of its Impact on International Commercial Relations.

In essence the holding in the District Court was that service on a subsidiary corporation is sufficient to gain jurisdiction over a parent when the parent controls and participates in policy decisions of the subsidiary.

The effect of the decision is to subject every alien corporation which has an American subsidiary to service in suits in our courts under the antitrust laws, with the corollaries of lengthy depositions of principal executives and almost unlimited discovery as to their business and internal affairs.

#### The Conflict With Decisions of This Court.

The law has heretofore been clear that jurisdiction over a corporation cannot be obtained merely by serving a wholly owned subsidiary unless the existence of the subsidiary is

"pure fiction" tantamount to fraud or unless the arrangement violates public policy.

The leading case for the foregoing proposition, *Cannon Manufacturing Co.* v. *Cudahy Co.*, 267 U. S. 333, has never been altered by this Court but rather continually and consistently reaffirmed by it, and followed by the lower courts. E.g., *Harris* v. *Deere and Company*, 223 F. 2d 161 (4th Cir. 1955); *Gravely Motor Plow Co.* v. *H. V. Carter Co.*, 193 F. 2d 158 (9th Cir. 1951).

In the *Cudahy* case the parent's domination of its subsidiary was far more complete than the alleged domination of the American Company by its parent in the instant case.*

This Court found (267 U. S. at 333) that the subsidiary was handled in substantially the same way as "those sell-

* In *Cudahy* the parent, Cudahy Packing Company, owned all of the outstanding stock of its subsidiary, Cudahy of Alabama; the president and vice-president of both corporations were the same; the books and accounts of the subsidiary were kept at the offices of the parent in Chicago; the employees of the parent who rendered services for the subsidiary at the Chicago office were paid by the parent and a regular charge was made on the subsidiary for these services; all correspondence from any branch office of the subsidiary went directly to the general offices in Chicago addressed merely to "Cudahy"; all correspondence was opened in a general mail department and distributed to employees who worked on the business of Cudahy of Alabama; a substantial part of the food products sold by the subsidiary was procured from the parent; all money on which the subsidiary operated was advanced or loaned by the parent; the books of the subsidiary were audited by auditors employed by the parent; the price of goods sold by the subsidiary was set by the parent; money collected by the subsidiary from sales was deposited in local banks and much of it was drawn immediately by the parent; the subsidiary had no control of funds once they were deposited and was unable to draw checks on deposits; all money for salaries and expenses was obtained by drafts drawn on the parent; every business decision of the subsidiary came from some individual who was also an officer of the parent; the same two men were assistant treasurers of both corporations and the general counsel of Cudahy was one of the directors of the subsidiary; exhaustive reports constituting a complete resume of the financial results of the branch were submitted periodically to the parent; and the subsidiary had no surplus and paid no dividends and was at all times indebted to the parent.

ing branches or departments of its business not separately incorporated", which marketed products in other states.

The court also said (*ibid.*) that the corporate separation was adopted "solely to secure to defendant some advantage under local law." It commented as follows:

> "The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the State in its corporate capacity. * * * It preferred to employ a subsidiary corporation. Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein. Compare *Lumiere* v. *Mac Edna Wilder, Inc.*, 261 U. S. 174, 177-8. That such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction was settled by *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, 409-11; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364; and *People's Tobacco Co., Ltd.* v. *American Tobacco Co.*, 246 U. S. 79, 87. In the case at bar, the identity of interest may have been more complete and the exercise of control over the subsidiary more intimate than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. *The corporate separation, though perhaps merely formal, was real: It was not pure fiction.* There is here no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant. Hence, cases concerning substantive rights, like *Hart Steel Company* v. *Railroad Supply Co.*, 244 U. S. 294; *Chicago, etc. Ry. Co.* v. *Minneapolis Civic Association*, 247 U. S. 490; *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71; and *United States* v. *Lehigh Valley R.R. Co.*, 254 U. S. 255, have no application." (pp. 336-337). (Emphasis added)

See also *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364; *Harris* v. *Deere and Company*, 223 F. 2d 161 (4th Cir. 1955); *Fergus Motors, Inc.* v. *Standard-Triumph Motor Co.*, 130 F. Supp. 780 (S. D. N. Y. 1955).

The decision of the District Court in the instant case is directly contrary to the decision of this Court in the *Cudahy* case. Its refusal to follow that case is clearly and flagrantly wrong and its action was therefore, necessarily a usurpation of jurisdiction.

**The District Court's Attempt to Distinguish the *Cudahy* Case.**

The only basis upon which the District Court attempted to distinguish the *Cudahy* case was that it was a contract action and not an antitrust case. Thus the District Court has ruled that the activities of a subsidiary will support service on the parent in an antitrust case although they will not support such service in other kinds of cases.

This ruling is directly contrary to District Court decisions in other circuits. *Terra Carpenter Ltd.* v. *Ideal Cement Co.*, 117 F. Supp. 441 (D. Neb. 1954); *Lawlor* v. *National Screen Service Corp.*, 10 F. R. D. 123 (E. D. Pa. 1950). Both of these cases applied the rule of the *Cudahy* case to actions brought under Section 12 of the Clayton Act.

More important is the fact that the District Court's ruling is in square conflict with all relevant decisions of this Court. Section 12 of the Clayton Act, 15 U. S. C. §22, embodies a more stringent requirement for service in antitrust cases than is required by due process. Section 12 provides that service may be made on a corporation only in the state of incorporation or in a district in which the corporation is "found".

It is important to note that the requirement of being "found" in the jurisdiction demands a greater showing of

corporate activity than does the "transacts business" requirement which must be met in order to support *venue* under Section 12 of the Clayton Act. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359.

It is equally clear that "found" demands more corporate activity than the "doing business" standard ordinarily applied in determining the amenability of a foreign corporation to service of process. This Court has never held that the word "found" in the Clayton Act has undergone the broadening and liberalization which this Court effected in the "doing business" requirement by its decision in *International Shoe Co.* v. *Washington*, 326 U. S. 310. The definitions of "found" in *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, and the *Eastman* case stand in sharp contrast to the standard applied in *International Shoe*.

It does not follow from the relaxation of the due process requirement in *International Shoe* that the requirement for service under §12 of the Clayton Act has also been relaxed. The meaning of "found" in Section 12 is purely a matter of statutory interpretation; the question is how far did Congress mean to go, not how far could it constitutionally go. It is significant that although Congress deliberately eased the venue requirement in antitrust cases by its addition of the words "transacts business" when it enacted Section 12, it has never sought to alter the service requirement. It has apparently been satisfied with this Court's interpretation of the word "found" in the *People's Tobacco* and *Eastman* cases.

In *United States* v. *Scophony Co.*, 333 U. S. 795, where this Court was dealing with Section 12 of the Clayton Act, the opinion specifically stated:

> "We deal here with a problem of statutory construction, not one of constitutional import. Nor do we have any question of the exercise of Congress'

power to its farthest limit. The issue is simply how far Congress meant to go'' (p. 804).

In a footnote, the Court specifically rejected the standard applied in the *International Shoe* case, pointing out:

> ''* * * we are not concerned here with finding the utmost reach of Congress' power'' (p. 804).

It is thus clear that the requirement imposed for service in antitrust cases by §12 of the Clayton Act is stricter than the ''doing business'' requirement generally applied in determining the amenability of a corporation to service. This points up sharply the District Court's error in ruling that a more lenient requirement should be used in antitrust cases than is applied in contract or other actions.

**The District Court's Interpretation of the Standard for Service under the Clayton Act.**

Even under the relaxed interpretation of ''doing business'' in the *International Shoe* case the activities of a subsidiary will not alone support service on its parent. That the subsidiary is wholly owned, dominated and controlled by the parent is immaterial. Since the decision in that case, the lower courts have consistently applied the rule of the *Cudahy* case in determining whether a foreign corporation has subjected itself to suit.*

* *E.g., Harris* v. *Deere and Company*, 223 F. 2d 161 (4th Cir. 1955); *Gravely Motor Plow & Cultivator Co.* v. *H. V. Carter Co.*, 193 F. 2d 158 (9th Cir. 1951); *Echeverry* v. *Kellogg Switchboard & Supply Co.*, 175 F. 2d 900 (2nd Cir. 1949); *Anderson* v. *British Overseas Airways Corp.*, 144 F. Supp. 543 (S. D. N. Y. 1956); *Shedd* v. *Willys Motors, Inc.*, 143 F. Supp. 391 (S. D. N. Y. 1956); *Fergus Motors* v. *Standard-Triumph Motor Co.*, 130 F. Supp. 780 (S. D. N. Y. 1955); *Bergholt* v. *Hudson Motor Car Co.*, 124 F. Supp. 716 (D. Minn. 1954); *Dam* v. *General Electric Co.*, 111 F. Supp. 342 (E. D. Wash. 1953); *Stetson China Co.* v. *D. C. Andrews & Co.*, 9 F. R. D. 135 (N. D. Ill. 1948). In the *Harris, Anderson, Dam* and *Stetson* cases, the courts specifically discussed *International Shoe* and decided that it did not abrogate the rule of the *Cudahy* case.

In *Le Vecke* v. *Griesedieck Western Brewery Co.*, 233 F. 2d 772, 776 (9th Cir. 1956) the Court said:

> "Notwithstanding the reexamination of the requisites of due process in this area of the law which the Supreme Court of the United States has undertaken in such cases as International Shoe Co. *v.* State of Washington, . . . the leading case of Cannon Manufacturing Co. *v.* Cudahy Packing Co. . . . has not been overruled and, more significantly, has recently been cited and followed."

Unless all of these cases are to be overruled, the decision of the District Court in the instant case creates a more lenient standard for service under the Clayton Act than is embodied in the requirements of due process. Such an interpretation of the Clayton Act is inconsistent with this Court's language in the *Scophony* case and with its interpretations of Section 12 ever since the decision in the *People's Tobacco* case.

**The District Court's Reliance on the *Scophony* Case.**

The only decision of this Court relied on by the District Court in determining that the rule of the *Cudahy* case does not apply in antitrust proceedings was *United States* v. *Scophony Co.*, 333 U. S. 795. It is clear from a reading of the *Scophony* opinion and examination of the facts in that case that the decision does not support this proposition.

The holding that service was valid in the *Scophony* case was expressly rested on the independent activities of the parent, not on the activities of the subsidiary. There was no determination or suggestion that jurisdiction over the parent was found as a result of the activities of the sub-

sidiary. Indeed, the government disclaimed any such argument and contended that the English company was present through its own individual representatives since an impasse had arisen in the affairs of the subsidiary which required the parent to act in the jurisdiction through its own individual agents.

The basis of the decision in the *Scophony* case was that the only business which the English company was carrying on any place in the world was patent licensing and negotiations relating thereto. Since these activities were being carried on by the English company through its individual agents in New York it was subject to service even though it did not manufacture or sell products in New York. This Court held that the British parent was actively engaged in the United States at the time of service in carrying on "largely if not exclusively the only business" it had (333 U. S. at 810), and the officer of the British parent who was served within the district was for all relevant purposes at that time the British company (333 U. S. at 816). He was in New York as a director and with practically an unlimited power of attorney-in-fact. He testified that this gave him "full power to do anything that I might decide in connection with the affairs of Scophony, Ltd., as applicable" to the American situation (Record, p. 223). He would not deny that he controlled the British company (Record, p. 49).

The *Scophony* decision expressly stated that the situation presented was completely different and distinct and was not "governed * * * by reference to the very different businesses and activities of manufacturing and selling" (333 U. S. at 817) such as are here present. This Court said:

> "In sum, we have no such situation as was presented in the manufacturing and selling cases on

> which appellee relies [*e.g.*, the *Cudahy* case]. They concerned entirely different facts and enterprises'' (p. 816).

This Court also expressly stated that

> ''* * * those decisions [*e.g.*, *Cudahy*, *Peterson*] may be left untouched for the facts and situations in which they have arisen and to which they have been applied'' (p. 817).

**Certiorari Should Be Granted to Review This Question.**

Certiorari should be granted in this case in order to reverse the District Court's plainly erroneous application of the *Scophony* case. If the decision is permitted to stand there will inevitably result serious harm to international commercial relations generally and to the domestic and foreign commerce of the United States. As this court has pointed out,

> ''* * * in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its laws to an American transaction.'' *Lauritzen* v. *Larsen*, 345 U. S. 571, 582.

The investment of American companies in subsidiaries abroad is enormous. A determination that the American parents are subject generally to service of process in each country where their subsidiaries operate would create havoc in the American financial and business community.

## II.

**In View of the Clear Error of the District Court, the Public Importance of the Question Decided, and the Serious Prejudice to the Petitioner, the Court of Appeals Should Have Granted the Petition for Mandamus. Its Failure to Do So Compounds the Error of the District Court and Intensifies Its Importance and Effect.**

The Court of Appeals concluded that the decision of the District Court was doubtful in law and fact, but nevertheless held that use of the extraordinary writ was inappropriate.

The suggestion that there was a factual doubt in the case is plainly in error. The facts upon which the District Court relied in asserting jurisdiction were conceded by the Petitioner. Thus the question presented to the Court of Appeals was the legal question whether on the conceded facts the District Court was justified in asserting jurisdiction.

As Petitioner has already demonstrated, the Court of Appeals was also in error when it concluded that the ruling of the District Court was merely doubtful in point of law. On the contrary, examination of the decisions of this Court indicates that the District Court was plainly wrong. The effect of the denial of mandamus by the Court of Appeals is to say to alien parents of American subsidiaries that even though they are improperly summoned before federal District Courts they must appear and defend themselves in lengthy and expensive proceedings and risk possible sanctions under their own domestic laws. To tell them that at the conclusion of the entire case they can argue on appeal that jurisdiction is clearly lacking would be to deny them any effective relief.

**The Appropriateness of the Extraordinary Writ to Review an Erroneous Assertion of Jurisdiction.**

The All Writs Act, 28 U. S. C. §1651 (1952), empowers the United States Supreme Court and Courts of Appeals to issue:

> "* * * all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In its recent consideration of the meaning and scope of this statute, *LaBuy* v. *Howes Leather Company, Inc.*, 352 U. S. 249, this Court viewed very favorably the use of such writs for the "supervisory control of the District Courts by the Courts of Appeals [which] is necessary to proper judicial administration in the federal system." 352 U. S. at 259-60. The Court specified at least three instances when the extraordinary writ should be used:

> (1) Where there is clear abuse of discretion;
>
> (2) Where there is usurpation of judicial power either by exceeding the limits of jurisdiction or refusing to exercise jurisdiction (On this point the dissenters agreed, see *infra*);
>
> (3) Where appellate review will be defeated.

The second of these instances was stated in *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 26, to be one in which issuance of the writ was especially appropriate. Later decisions have on several occasions repeated or paraphrased this statement. *E. g.*, *United States Alkali Export Association* v. *United States*, 325 U. S. 196, 202; *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 383.

This Court has consistently held that one of the situations in which mandamus is particularly appropriate is

where the lower court has acted beyond its jurisdiction, as it has in the instant case. *United States Alkali Export Ass'n Inc. v. United States*, 325 U. S. 196; *De Beers Consolidated Mines, Ltd. v. United States*, 325 U. S. 212; *In the Matter of N. L. R. B.*, 304 U. S. 486. In cases in which the writ has been denied, the Court has often taken pains to point out that the lower court's jurisdiction of the persons of the defendants and the subject matter of the actions was not questioned. *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 382 (1953); *Roche v. Evaporated Milk Ass'n, supra*, 319 U. S. at 30.

It is to be noted that the dissenting Justices in *LaBuy v. Howes Leather Company, Inc., supra*, were in full accord with the majority that mandamus properly lies where the District Court " 'has exceeded . . . its jurisdiction' " (352 U. S. at 260).

The Court of Appeals for the Seventh Circuit has indicated that mandamus is an appropriate remedy to review the denial of a motion to quash service under Section 12 of the Clayton Act. *Comfort Equipment Co. v. Steckler*, 212 F. 2d 371, 377 (7th Cir. 1954); *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F. 2d 378, 380 (7th Cir. 1954). This Court has recently approved the mandamus practice of the Seventh Circuit. *LaBuy v. Howes Leather Company, Inc., supra*, 352 U. S. at 257.

**The Effect of the Ontario "Business Records Protection Act".**

There are present in this case additional and unusual factors which Petitioner earnestly suggests make the grant of the extraordinary writ particularly important.

The decision making Petitioner a party to the case subjects it to the Federal Rules of Civil Procedure, which

have already been extensively invoked by plaintiffs. The record below will show that plaintiffs are seeking the discovery and the production by the Canadian Company from Ontario of all documents relating to every phase of its business from 1952 to date. Any attempt at compliance with any part of plaintiffs' demand for the discovery of documents will expose the Canadian Company or its directors or officers to penal proceedings in Ontario.

"The Business Records Protection Act" of the Province of Ontario [Revised Statutes of Ontario, 1950, c. 44] was enacted in 1947 and provides with exceptions not here relevant that:

> "1. No person shall pursuant to or under or in a manner which would be consistent with compliance with any requirement, order, direction or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside of Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point within Ontario to a point outside of Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report or material in any way relating to any business carried on in Ontario * * *."

Section 2 provides for enforcement of the act by the "attorney general or any person having an interest in the business." Penalties up to one year's imprisonment may be imposed.

At the time of the introduction of this statute in the Ontario Legislature on October 27, 1947, the then Premier of Ontario stated that the proposed statute was a result of a subpoena *duces tecum* issued by the United States District Court for the Southern District of New York in an

antitrust proceeding against two Canadian corporations.* The decision to which the Premier referred was *In re Grand Jury Subpoenas Duces Tecum*, 72 F. Supp. 1013 (S. D. N. Y. 1947). The court there found on the basis of contacts much more substantial than those involved in the present case that both Canadian companies were subject to its jurisdiction. One maintained New York offices, had qualified to do business in New York and had designated the Secretary of State as its agent for service of process. The other corporation maintained officers and offices in New York City, where extensive business on its behalf was conducted.

In the course of his statement to the Ontario Legislature, the Premier expressed very strongly his objection to the invasion of the "territorial integrity of Canada" by the courts of this country. He pointed out that the bill he was introducing would make it a legal offense to comply with any order of a foreign court requiring the removal from Ontario of any business records. Relevant portions of the Premier's statement are printed at page 17a of the appendix.

It is manifest from the provisions of the Ontario Act and the statements of the then Premier of Ontario that the Canadian Company is now in jeopardy under this statute of its home province of Ontario and that only a granting of this petition and a reversal of the lower court can remove this danger. The statements of the Premier of Ontario also illustrate the importance to other nations of any attempt to assert jurisdiction over foreign parents of American subsidiaries.

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* The Economic Competition Bill of The Netherlands is another indication of international impact of anti-trust lawsuits in this country involving alien corporations. That bill was adopted on March 14, 1956, and was the direct outgrowth of the "oil cartel" litigation by the United States government. Article 30 prohibits compliance with measures or decisions of another country regulating competition without permission of The Netherlands' government. Friedmann, Antitrust Laws— A Comparative Symposium 278 (1956).

**Other Factors Supporting the Use of the Extraordinary Writ.**

In determining whether or not an extraordinary writ should issue, it is proper to consider the inconvenience and expense of allowing a case to proceed to final judgment without correcting the unauthorized action of the District Court. The importance of this factor is emphasized in the *United States Alkali Export* case, *supra*, 325 U. S. at 204. In *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, the petitioner sought review by mandamus of an interlocutory order of the Court of Claims. The Court of Claims had refused to allow the plaintiff in an action before it to dismiss the action without prejudice. This Court held that the plaintiff was entitled to a voluntary dismissal and granted the extraordinary writ. It reasoned as follows:

> "It would be a useless waste of time and effort to enforce a trial in the Court of Claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated" (p. 96).

In the recent case of *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 388, Justice Frankfurter pointed out in his dissenting opinion, in which Justices Minton and Jackson joined, that the ruling of the majority denying mandamus left open the question whether the writ would also be denied in circumstances where postponing of review would involve "a protracted trial entailing heavy costs and great inconvenience". The instant case will require just such a trial. Failure to review the district judge's assertion of jurisdiction would require the Canadian Company to defend itself in an action involving complicated legal and factual issues, many witnesses and innumerable

documents. It will subject the Canadian Company to the inconvenience and expense occasioned by the almost unlimited pre-trial discovery which complex antitrust litigation invariably involves.

Congress has not seen fit to impose such burdens on foreign corporations outside the jurisdiction of the United States courts. It has in each of its last three sessions failed to enact a bill which in substance provided, by a proposed amendment to the Clayton Act, that any alien corporation doing business in the United States through a subsidiary, affiliate or otherwise would be required to produce papers from abroad for use in antitrust litigation in the United States. H. R. 7339, 98 Cong. Rec. 3332 (82d Cong., 2d Sess. 1952); H. R. 391, 99 Cong. Rec. 61 (83d Cong., 1st Sess. 1953); H. R. 642, 101 Cong. Rec. 44 (84th Cong., 1st Sess. 1955).

Congress did not see fit to enact the proposed statutes. It is respectfully submitted that the court below has gone farther than Congress itself has been willing to go in subjecting alien corporations to jurisdiction of our courts in antitrust litigation.

Such disregard of congressional purpose is even more significant when as the result every foreign corporation which has an American subsidiary becomes subject to the jurisdiction of the United States courts. This impact upon our relations with other nations and their citizens gives the case a public importance which provides additional justification for resort to the extraordinary writ. *Ex parte Peru*, 318 U. S. 578.

It is apparent that there are present in this case all of the factors which have been considered heretofore by this Court to require the issuance of an extraordinary writ: a clearly erroneous assertion of jurisdiction, serious prejudice to the party over which jurisdiction was asserted,

subjection of a party to expensive and time-consuming judicial proceedings, subversion of an important congressional purpose and impact upon international commerce and upon our relations with other nations, presenting a problem of great public importance.

Accordingly this Court should exercise its supervisory powers now and grant the writ of certiorari and reverse the decision below.

## III.

### The Ruling of the Court of Appeals that the Legal Difficulty of a Jurisdictional Question is a Sufficient Ground for Denying the Extraordinary Writ Should Be Reversed by this Court in the Interest of Efficient Judicial Administration.

The Petitioner has consistently contended, and believes that it has demonstrated, that the ruling of the District Court was not merely doubtful but was plainly wrong.

Assuming, however, with the Court of Appeals, that the error of the lower court was not clear but that there was some difficulty about the legal question, is this a sufficient ground for denying the extraordinary writ? The Petitioner contends that it is not and that the contrary ruling of the Court of Appeals is of sufficient importance to procedure in the federal courts that this Court should grant the writ of certiorari and reverse the decision below.

The magnitude of a judge's error should not be relevant in determining whether the extraordinary writ should issue. The crucial question is whether the circumstances justify a departure from the "final judgment" rule. There are many situations where the Appellate Court's consideration of an

interlocutory order at some time prior to final judgment is desirable in order to prevent hardship to the parties or usurpation of jurisdiction by the lower court. Not all of these situations can be dealt with by specific statutory provisions permitting interlocutory appeals. The question in every case is whether it will be conducive to efficient judicial administration to provide review of the interlocutory jurisdictional order through the flexible device of the extraordinary writ. See 6 Moore *Federal Practice* 68-72 (2d ed. 1953).

This approach to the problem, which this Court has adopted in recent decisions, plainly leaves no room for denial of the writ merely because the question to be decided is a difficult one. When extensive discovery has been already conducted for the express purpose of adducing the relevant facts, the legal decision will not become easier by being postponed. If a decision at an early stage in the litigation will expedite matters and prevent hardship to a party, the decision should be made irrespective of its difficulty.

There is no basis for the statement of the Court of Appeals that further jurisdictional facts might be developed in the course of the proceedings. The plaintiffs were given every opportunity to uncover and were furnished the facts bearing on jurisdiction, through depositions and the production of documents. Certainly the facts relevant on the jurisdictional question should be and were ascertainable, and were ascertained, without deferring the question for a trial on the merits, which necessarily would involve these and many other facts. Such a postponement of appellate review would constitute in this case a denial of any effective appellate review of the jurisdictional question.

In the cases relied on by the Court of Appeals where the extraordinary writ was denied because the decision below was not clearly wrong, the doubt arose from a factual deficiency in the record rather than merely a question of law. Those cases provide no support whatever for the decision of the Court of Appeals in the instant case.

In *Ex parte Muir*, 254 U. S. 522, a suit in admiralty had been commenced *in rem* against a British vessel. Private counsel representing the British Embassy appeared as *amicus curiae* and presented a suggestion that the vessel was in the public service of Great Britain and that the court should therefore decline to exercise jurisdiction. When the libelant called upon the respondent and the *amicus* to produce the ship's papers and other documents which might throw light on the status of the vessel, they refused to do so, contending that the mere suggestion was sufficient to require dismissal of the proceeding.

The Supreme Court pointed out, in denying the extraordinary writ, that the British Government might have presented its suggestion through diplomatic channels or it might have intervened as a party in the action. The Court said that since the claim was not presented in one of these more satisfactory ways it was not entitled to full consideration.

It was against this background that the Court used the language quoted by the Court of Appeals in this case, to the effect that where the jurisdiction of the lower court is merely doubtful in fact the extraordinary writ should be denied. Obviously such a ruling was appropriate in the *Muir* case. The facts had not been developed and the jurisdictional question was not properly raised. But the situation in the *Muir* case was in no way similar to the situation presented to the Court of Appeals in the instant

case where the record was and is ample, and indeed as complete as it needs to be, or will ever be.

The other case relied on by the Court of Appeals was *Ex parte Chicago, Rock Island & Pacific Railway Co.*, 255 U. S. 273. There the District Court had decided a jurisdictional question on the basis of evidence which was in no way recorded and was not set out in the petition for mandamus. This Court concluded that under these circumstances the jurisdiction below was merely doubtful and that the writ should not issue. This was obviously the correct result, since this Court had no proper basis for reviewing what was done below. That case has no application here, however, since the facts upon which the District Court relied were conceded by the Petitioner, and the entire record in the lower court was available.

Where a jurisdictional question has not been properly raised, or where the facts have not been developed or the evidence before the lower court was not recorded, it is of course clear that the issuance of an extraordinary writ is inappropriate. Petitioner submits, however, that the mere legal difficulty of the jurisdictional question cannot support a denial of the writ. The contrary ruling of the Court of Appeals subverts the effective use of the extraordinary writs in the very situations where they are most necessary. In the interest of efficient judicial administration in the federal courts this Court should grant the writ of certiorari and reverse the decision below.

## Conclusion.

This case presents national issues of both antitrust policy and federal procedure which urgently require immediate decision by this Court. The proper resolution of

these issues is of importance to the efficient administration of justice in the federal courts and to the business and financial world, to international commerce, and to our relations with other nations, as well as being vital to the Petitioner which has been subjected to what it believes an unwarranted and serious error.

Petitioner respectfully prays that this Court review and reverse the decisions below.

Respectfully submitted,

JOHN F. SONNETT,
Counsel for Petitioner, Massey-Harris-Ferguson, Ltd.

Of Counsel:

WILLIAM MERCER ALEXANDER,
COOPER TURNER, JR.,
KENNETH D. WALLACE,
THOMAS R. PRICE.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1956.

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MASSEY-HARRIS-FERGUSON LIMITED,

Petitioner,

*v.*

HON. MARION SPEED BOYD, United States Judge for the Western District of Tennessee,

Respondent.

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**MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR OTHER APPROPRIATE WRIT TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.**

Petitioner herein today filed with this Honorable Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit under 28 U. S. C. §1254(1), to review an order of said Court of Appeals denying a petition for writ of mandamus or other appropriate writ to the United States District Court for the Western District of Tennessee.

In the event said Petition for Writ of Certiorari is denied, Petitioner hereby files this motion for leave to file with this Honorable Court the said petition as a Petition for Writ of Mandamus or Other Appropriate Writ to the District Court of the United States for the Western District of Tennessee.

The jurisdiction of this Court is invoked under Section 1651(a) of Title 28, United States Code. The authority of this Court to issue an extraordinary writ to review the action of the District Court, after the denial of such a writ by the Court of Appeals, is sustained by *Ex parte Kawato*, 317 U. S. 69. See also *Ex parte Peru*, 318 U. S. 578; *McCullough v. Cosgrave*, 309 U. S. 634; *Ex parte United States*, 287 U. S. 241.

Respectfully submitted,

JOHN F. SONNETT,
Counsel for Petitioner, Massey-Harris-Ferguson, Ltd.

Of Counsel:

WILLIAM MERCER ALEXANDER,
COOPER TURNER, JR.,
KENNETH D. WALLACE,
THOMAS R. PRICE.

# APPENDIX.

## Section 12 of the Clayton Act (15 U. S. C. §22.)

"§22. District in which to sue corporation.

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. (Oct. 15, 1914, ch. 323, §12, 38 Stat. 736.)"

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## All Writs Statute (28 U. S. C. §1651(a)).

"§1651. Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule *nisi* may be issued by a justice or judge of a court which has jurisdiction. (June 25, 1948, ch. 646, §1, 62 Stat. 944; May 24, 1949, ch. 139, §90, 63 Stat. 102.)"

## Opinion.

No. 13121

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

| | |
|---|---|
| MASSEY-HARRIS-FERGUSON, LIMITED, Petitioner, *v.* HON. MARION SPEED BOYD, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE, Respondent. | PETITION for Writ of Mandamus or Prohibition or Other Appropriate Writ. |

Decided April 12, 1957.

Before: ALLEN, MILLER and STEWART, Circuit Judges.

MILLER, Circuit Judge. Petitioner, Massey-Harris-Ferguson, Limited, a Canadian corporation with its principal office in Toronto, Ontario, Canada, has filed in this court its Petition for Writ of Mandamus or Prohibition or Other Appropriate Writ against Hon. Marion Speed Boyd, United States District Judge for the Western District of Tennessee, pursuant to Section 1651(a), Title 28, U. S. Code. The petition prays that this court issue an appropriate writ directing Respondent to vacate and set aside the order entered by him on January 4, 1957 in Action No. 2969, U. S. District Court for the Western District of Tennessee, in which Southland Tractors, Inc., and Farm Tractors, Inc., are plaintiffs, and the Petitioner, herein referred to as the Canadian Corporation, together with Massey-Harris-Ferguson, Inc., a corporation organized under the laws of Maryland, and a wholly-owned subsidiary of the Petitioner, herein referred to as the American Company, are named defendants.

*Opinion.*

In the District Court action, the plaintiffs claim to have been damaged in amounts exceeding $2,500,000 and $3,150,000, respectively, by reason of violations by the defendants of the provisions of the Sherman Anti-Trust Act, Sections 1-33, Title 15, U. S. Code, for which alleged wrongs they claim triple damages. No question is raised about jurisdiction over the American Company. Process against the Canadian Corporation was served in Memphis upon an Assistant Branch Manager of the Memphis Branch of the American Company, and in Detroit, Michigan, upon Herman Klem, who was an officer of both the American Company and the Canadian Corporation. The Canadian Corporation appeared specially and moved to quash the purported service upon it upon the grounds that it was not an inhabitant of or transacting business in the Western District of Tennessee and was not either actually or legally present or found in the Western District of Tennessee, and accordingly was not subject to suit in said District. The motion was supported by affidavits of officers and agents of the two companies stating the separate corporate existence of the two companies, that the Canadian Corporation was not qualified to do business in Tennessee and had never maintained any office or place of business in the Western District of Tennessee, that it had never done any advertising, solicited any business, made any sales, or appointed anyone as its agent in the Western District of Tennessee, that it had never made any sales to the plaintiffs, and that the American Company had never acted as the agent for the Canadian Corporation but had in all its dealings with the plaintiffs acted solely in its own name and for its own account. The plaintiffs filed a verified response to the motion to quash which denied the allegation of the Canadian Corporation that it was not transacting business in the Western District of Tennessee, and stated that the Canadian Corporation had, since long prior to August 1953, carried on a tremendous business in the Western District of Tennessee through its own instrumentalities and agen-

cies, and that the American Company was organized as an outlet for the sale in the United States of products manufactured by the Canadian Corporation and has at all times since its organization been an instrumentality and agency for the Canadian Corporation. Several hundred pages of depositions, which included numerous exhibits, were taken on the issue involved, which evidence has been forwarded to this Court for its consideration.

The District Judge made the following findings of fact:

> "The American company maintains a district office at Memphis with a manager, and assistant manager, and certain other personnel. This office is the distributor for farm machinery manufactured by both the American company and the Canadian company. It appears that merchandise of the approximate value of three million dollars yearly was shipped into Memphis from the Canadian concern, and that this accounts for between sixty and seventy-five percent of the business done by the local office. The Canadian company, incidentally, claims that all of these sales are the result of contracts between it and the American company. However, the correspondence in the record reveals that the American company was mainly the sales outlet in the United States for the Canadian concern. There are (interlocking) officers and directors as between the two. Annual statements of the Canadian company shows the American company as a division or branch of the Canadian company, which would mean that the Memphis office is probably a sub-branch. Engineers are sent to Memphis from Canada to run field tests for the purpose of developing farm equipment for use by farmers in this trade territory or section of the country. These engineers paid expense money by the local office.

*Opinion.*

> "The whole structure of the Canadian company is, in the Court's opinion, that of a very large enterprise with full control of all of its many operations, including the Memphis office in this judicial district. The American company operates wholly under the control and dominion of the Canadian company, even to the extent of procuring approval for the expenditure of moneys of any substantial amount."

The District Judge ruled that for all intents and purposes there was only one corporation, the parent Canadian Corporation, with the American Company and affiliates being merely adjuncts or instrumentalities of the Canadian Corporation; that the activities and operations of the Canadian Corporation were a continuous course of business of a substantial character within the Western District of Tennessee; and that the Canadian Corporation was found in the District, was transacting business in the District, and was subject to the jurisdiction of the court and its processes. The motion to quash was overruled by order of January 4, 1957, which is the order the present application for Mandamus by the Canadian Corporation seeks to have vacated.

Petitioner contends that the ruling of the District Judge that the Court has jurisdiction over it is clearly erroneous, that it encroaches upon the sovereignty of Canada and will expose Petitioner or its officers to fines and penal provisions under Canadian or Ontario laws or to contempt of the lower court, that the Petitioner has no adequate remedy through any ordinary appellate procedure which might eventually be available to it, and that it will suffer irreparable injury from the action of the District Judge if it is required to proceed with the defense of the case, and that Mandamus or Prohibition under the All Writs Act, Sec. 1651, Title 28, U. S. Code, is the appropriate remedy where a District Court erroneously asserts jurisdiction over an alien corporation clearly not subject to jurisdiction. On the question of jurisdiction it relies chiefly,

upon *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U. S. 333. See also: *People's Tobacco Co., Ltd.* v. *American Tobacco Co.*, 246 U. S. 79, and *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359. The District Judge relied chiefly upon *United States* v. *Scophony Corp.*, 333 U. S. 795. See also: *International Shoe Co.* v. *Washington*, 326 U. S. 310; *Travelers Health Assn.* v. *Commonwealth of Virginia*, 339 U. S. 643; *Scholnik* v. *National Airlines*, 219 F. (2) 115, C. A. 6th, cert. denied, 349 U. S. 956, rehearing denied, 350 U. S. 868.

In the present state of the litigation we consider it inadvisable to rule on the issue involved. The record in its present shape indicates that the question is a difficult one, and the ruling doubtful, both as a matter of fact and in point of law. As was said by the Supreme Court in *Ex parte Muir*, 254 U. S. 522, 533, "The suit is still in the interlocutory stage. The Court may take up again the question of its jurisdiction. If it does, the inquiry may proceed on other lines and the facts may be brought out more fully than before. In addition, the question may be re-examined in regular course on an appeal from the final decree." The Court in that case held that where the existence or absence of jurisdiction is in doubt, the granting or refusal of the writ is discretionary, and deemed it a proper exercise of discretion to refuse the writ. See also: *Ex parte Chicago, R. I. & Pac. Ry.*, 255 U. S. 273.

Assuming that it should be found to be erroneous, it is subject to review by us if and when a final judgment should be entered against the Petitioner. *Eastman Kodak Co.* v. *Southern Photo Co., supra.* The present ruling is not a final order, but interlocutory in nature, from which an appeal does not lie. Sec. 1291, 1292, Title 28, U. S. Code. In the usual case the rule against piecemeal appeals is not to be circumvented by resort to Mandamus or Prohibition. *Ex parte Harding*, 219 U. S. 363; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 27-31; *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379.

*Opinion.*

We do not consider the recent decision of the Supreme Court in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, as changing the rule. It recognized that Mandamus should be resorted to only in extreme cases, but held that the unusual circumstances existing in that case made the use of the writ appropriate. In our opinion, the present case does not involve such unusual circumstances. *Ex parte Fahey*, 332 U. S. 258; *Direct Transit Lines* v. *Starr*, 219 F. (2) 699, C. A. 6th; *Sunbeam Corp.* v. *Picard*, 227 F. (2) 596, C. A. 6th. See also: *Eastman Kodak Co.* v. *Southern Photo Co.*, *supra*, 273 U. S. 359, 367-368, where the usual procedure was followed after an adverse ruling to the defendant on the question of jurisdiction.

The Petition for Writ of Mandamus or Prohibition or Other Appropriate Writ is denied.

## Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

No. 15,121.

MASSEY-HARRIS-FERGUSON, LIMITED,
Petitioner,

*v.*

HON. MARION SPEED BOYD, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE,
Respondent.

Order.
Filed April 12, 1957.

Before:

ALLEN, MILLER AND STEWART,
Circuit Judges

The petition of Massey-Harris-Ferguson, Limited, for Writ of Mandamus or Prohibition or Other Appropriate Writ directed to the respondent Honorable Marion Speed Boyd, United States District Judge for the Western District of Tennessee, together with briefs for the respective parties, having been considered by the Court,

IT IS ORDERED that said petition be denied.

Approved for entry:

/s/ SHACKELFORD MILLER, JR.
United States Circuit Judge

## Opinion of Judge Boyd of January 3, 1957.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SOUTHLAND TRACTORS, INC. and FARM TRACTORS, INC., Plaintiffs,

*vs.*

MASSEY-HARRIS-FERGUSON, INC., MASSEY-HARRIS-FERGUSON, LIMITED, and LYNN RUSSELL, Oklahoma City, Oklahoma, Defendants.

Civil Action No. 2969.

PROCEEDINGS ON JANUARY 3, 1957.

BE IT REMEMBERED That the above entitled cause came on to be heard on this the 3rd day of January, 1957, at nine-thirty o'clock A. M...on Motion of Defendant to Quash Service of Process, and after hearing the arguments of counsel in open court, the Court announced the following ruling:

The Court: Well, gentlemen, we have gone into this question fully today. The Court has examined the affidavits and the depositions on file, and has had the benefit of your authorities and the oral argument, so the Court will give you its views briefly at this time.

In the first place the determination of matters of jurisdiction and venue and liability to service of process in the Federal judicial system is usually somewhat difficult, and this case is no exception. The books are full of cases, but precedents do not necessarily control, as Mr. Turner puts it, since each case must be governed by its own peculiar state of facts.

The burden is upon the plaintiffs in this case, as we all seem to agree, to prove the jurisdictional allegations of their complaint, that is, that this Canadian concern, referred to as Limited, was in fact transacting in the ordinary and usual sense business of a substantial character in the Western District of Tennessee so as to make it amenable to the processes of this Court.

Now, as best the Court can understand, the plaintiffs have met this burden, and have shown the activities and operations of the Canadian company were a continuous course of business, business of a substantial character, throughout the period here in question, which makes it subject to suit in this jurisdiction. Again, as best the Court can tell, an important segment or part of its over-all business of manufacturing and selling and the distribution of its products was during all times material transacted within the confines of this judicial district.

There seems to be a difference of opinion between counsel, but the Court is warranted in saying here, Mr. Turner, I believe, that for all intents and purposes there is really only one corporation, and that is the parent Canadian entity referred to, as I say, as Limited, the American company and its wholly owned subsidiaries or affiliates being merely adjuncts or instrumentalities of the Canadian corporation.

The Canadian corporation's motion is based on the broad contention that it does or transacts no business in this district in the legal sense. It contends it had no agreement or business relations with the plaintiff which would authorize the suit in this court.

The facts, among other things, revealed through the affidavits, depositions and exhibits, are substantially as follows: The American company maintains a district office at Memphis with a manager, and assistant manager, and certain other personnel. This office is the distributor for farm machinery manufactured by both the American company and the Canadian company. It appears that mer-

chandise of the approximate value of three million dollars yearly was shipped into Memphis from the Canadian concern, and that this accounts for between sixty and seventy-five percent of the business done by the local office. The Canadian company, incidentally, claims that all of these sales are the result of contracts between it and the American company. However, the correspondence in the record reveals that the American company was mainly the sales outlet in the United States for the Canadian concern. There are (interlocking) officers and directors as between the two. Annual statements of the Canadian company shows the American company as a division or branch of the Canadian company, which would mean that the Memphis office is probably a sub-branch. Engineers are sent to Memphis from Canada to run field tests for the purpose of developing farm equipment for use by farmers in this trade territory or section of the country. These engineers paid expense money by the local office.

The whole structure of the Canadian company is, in the Court's opinion, that of a very large enterprise with full control of all of its many operations, including the Memphis office in this judicial district. The American company operates wholly under the control and dominion of the Canadian company, even to the extent of procuring approval for the expenditure of moneys of any substantial amount.

Now, the defendant Canadian company, among others, relies upon the case of Cannon Manufacturing Company against Cudahy Packing Company, reported in 267 U. S., Page 333, a breach of contract case, in which the Supreme Court in 1925 held that the presence of a corporate subsidiary in a state does not necessarily subject the parent corporation to the jurisdiction of the courts of that state.

The cases relied on by the plaintiff, for the most part, are cases arising under the antitrust laws, and particularly under Section 12 of the Clayton Act, carried into the Code as Section 22 of Title 15.

*Opinion of Judge Boyd of January 3, 1957.*

In United States against Scophony, a case relied on most heavily by the plaintiffs, Justice Rutledge, speaking for the Supreme Court in 1948, makes a very definite distinction in this regard when application is made under Section 12, and this to the Court seems to be the final word by the Supreme Court on this issue.

The Court in the Scophony case said:

> "The practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue."

Now, after reviewing some of the prior decisions, the Court used this rather pertinent language:

> "Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the "found"-"present"-"carrying-on-business" sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the "often insuperable obstacle" of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due."

And there is this rather pertinent paragraph:

> "In this case, however, we deal with a company incorporated outside the United States. But there can be no question of the existence of "jurisdiction," in the sense of venue under Section 12, over Scophony in the Southern District of New York. To say that on the facts presented Scophony transacted no business "of any substantial character"

there during the period covered by institution of the suit and the times of serving process would be to disregard the practical, nontechnical, business standard supplied by "or transacts business" in the venue provision. It would be also to ignore the fact that Scophony then and there was carrying on largely, if not exclusively, the only business in which it could engage at the time."

Now, the Scophony case involved a motion to quash by the English company, which operated in the Southern District of New York through its American subsidiary. The District Court granted the motion, and the Supreme Court reversed and remanded the case, holding that under Section 12 the District Court did have jurisdiction. Though the Supreme Court in Scophony did not directly overrule the Cannon and similar cases, it seems to have, pursuant to the definite trend, restricted its scope to very definite limits. We are bound to give due consideration, gentlemen, to this Scophony case in solving our problem here today.

Now, there are recent District Court opinions noted in the annotations following Section 22, which are in keeping, in the Court's opinion, with this Scophony case. To mention a couple, there is the Sudbury Wire Rope Manufacturing case, and the Abrams case discussed here today.

One further quote from the Scophony case is from a concurring opinion written by Justice Frankfurter, who agreed with the result, but thought it should be stated more briefly. Mr. Justice Frankfurter states in concurring:

"I deem it appropriate to state why I concur merely in the Court's result.

"The only question in this case is whether Scophony Limited, a British corporation, which has its offices and principal place of business in London, may be made a party defendant in a suit by the United States for violation of the Sherman Law

pending in the Southern District of New York. The corporation may be brought into court in that District if its activities there satisfy the requirements of Section 12 of the Clayton Act. According to this provision, Scophony Limited is properly a party defendant in this suit only if, by virtue of its activities, it is "found or transacts business" in the Southern District of New York, and it may be served in that District if it is "found" there.

"Whether a corporation "transacts business" in a particular district is a question of fact in its ordinary untechnical meaning. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be "found" anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact bearing on the unique circumstances of a particular situation, to be ascertained as such questions of fact are every day decided by judges."

So, it follows, gentlemen, in the Court's view of this matter, that the parent Canadian concern is found in this district and is transacting business in this district, and is subject to the jurisdiction of this Court and its processes. Service on the assistant manager in Memphis, and service in Detroit, seems to the Court to be valid.

Motion to quash is overruled.

Now, these, gentlemen, are the Court's rough, general views, and what the Court has said briefly will serve as findings and conclusions under the rules, at least for the present. If more detailed findings are necessary, counsel may propose some during the next few days. In the meanwhile, Mr. Taylor, get up an order on the Court's ruling today.

*Opinion of Judge Boyd of January 3, 1957.*

I hereby certify that the foregoing eleven pages constitute the ruling of the Court on January 3, 1957, on Motion to Quash in the case of

SOUTHLAND TRACTORS, INC., et al

*v.*

MASSEY-HARRIS-FERGUSON, INC., et al
Civil Action No. 2969
This 4th day of January, 1957.

MIRIAM TILL
Official Court Reporter
United States District Court

Western District of Tennessee

## Order of Judge Boyd of January 4, 1957.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

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| SOUTHLAND TRACTORS, INC., *et al.*, Plaintiffs, *vs.* MASSEY-HARRIS-FERGUSON, INC., *et al.*, Defendants, | No. 2969 Civil. |

ORDER.

This cause came on for hearing upon the complaint, the motion of Massey-Harris-Ferguson, Limited to quash service of process, and the affidavits filed in support of the motion, the plaintiffs' response to said motion, and upon the depositions of C. R. Haggard, H. H. Bloom, Cecil B. Milne, J. L. Hooker, L. M. Sweeney and H. G. Klemm and all the exhibits introduced in evidence to the depositions of witnesses and by stipulation, the stipulation of counsel with respect to the use of the depositions and exhibits, defendants' waiver of signature to the deposition of Cecil B. Milne, the affidavits of Howard Sullins and the exhibits thereto, Wesley Patch and Ernest Newbern, Jr., the return of the Marshal of processes served upon V. N. Deitling in Memphis, Tennessee, and H. G. Klemm, Vice-President of Massey-Harris-Ferguson, Limited, in Detroit, Michigan, and the Court having examined the evidence of witnesses and the documentary evidence filed in the cause and heard arguments of counsel is of the opinion that the defendant, Massey-Harris-Ferguson, Limited has at all pertinent times transacted business in the Western Dis-

trict of Tennessee, and that the processes issued by this Court and served upon V. N. Deitling and H. G. Klemm were both valid and adequate to bring Massey-Harris-Ferguson, Limited into court but that the service on Kenneth G. House was not effective, and that the said defendant, Massey-Harris-Ferguson, Limited, is amenable to suit in this District both with respect to venue and service of process and that the motion to quash should be overruled for the reasons stated by the Court in its opinion delivered at the conclusion of the hearing, which opinion will be treated as a finding of facts and conclusions of law and become a part of the record in the cause;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the "Motion To Quash Returns and Purported Service Of Summons And Complaint And To Dismiss Complaint" be and the same is hereby overruled and the defendant, Massey-Harris-Ferguson, Limited, is allowed ten (10) days from the entry of this order within which to answer the complaint as amended. (Call Turner re this.)

IT IS FURTHER ORDERED that the motion filed by Lynn Russell to quash service of process and dismiss action as to him is sustained because there is no evidence that Lynn Russell ever transacted any business within the Western District of Tennessee or has been found here.

MARION SPEED BOYD
United States District Judge

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## Statement of Premier of Ontario to Ontario Legislature, October 27, 1947.

25. The Premier said in his statement to the Ontario Legislature:

> "It must be remembered that these subpoenas were directed to companies and officers of those

companies doing business entirely within the Province of Ontario, *except insofar as they may engage in selling activities related to their export business in the United States.** Furthermore, most of the companies in question, if not all, are companies operating under charters issued by the Canadian Government, or by the Provincial Governments of Canada. They are strictly Canadian companies and it happens that they are also companies of the utmost importance to the Canadian economy since their combined production for export constitutes our largest type of export in dollar value.

"First, let us examine the effect of compliance with such a subpoena. It would result in most of the important records * * * being moved outside the jurisdiction of our ov[illegible]mpany[s'] and other laws for an indefinite period. [illegible]hose records are an essential part of the daily business of great industries giving direct and indirect employment to scores of thousands of Canadian w[illegible]en.

"Serious though this result would be, of infinitely more concern to every Canadian must be the far-reaching implications of such a procedure. *It implies the right of the Government of the United States* (by a subpoena *duces tecum*) *to invade the territorial integrity of Canada without application to the Canadian Government, to any provincial government, to any Canadian Court, or to any established channel of international representation in regard to international business.* There has been no similar proceed- has reason to believe that such a requirement has ing [of a "fishing expedition" by a subpoena *duces tecum*] during the long and happy relationship between Canada and the United States which has

* Emphasis supplied throughout.

*Statement of Premier of Ontario to Ontario Legislature, October 27, 1947.*

asserted the jurisdiction of the Government of the United States and of United States Courts over Canadian corporations and individuals doing business within Canada under Canadian laws. These proceedings are particularly improper in view of the fact that we have our own Anti-Combine Laws in Canada under which there are just as wide powers to prevent improper combinations in restraint of trade as are contained in the Anti-Trust Laws of the United States.

"If the Attorney-General of the United States does in fact believe that there has been any improper combination in restraint of normal trade, then the correct procedure would be for him to lay the facts in his possession before the proper authorities at Ottawa who could then take such action as was deemed advisable upon the evidence placed before them.

• • •

"This government objects very strongly to fishing expeditions through our own Courts, and it is certainly not prepared to approve of fishing expeditions of this nature into the affairs of our companies through the Courts of the United States in regard to something which is not properly before those Courts.

"That being so, I am introducing a bill which makes it a legal offence to comply with any requirement of a judicial authority outside of Ontario which would cause to be removed from this province to a point outside of Ontario any of the essential records of business being carried on in this province. It further provides that if the Attorney-General, or any person having an interest in a business so affected, been made or is likely to be made, proceedings may be taken before the Supreme Court of Ontario to insure that such records will not be removed.

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*Sections of the Revised Statutes of Canada (Ch. 307, 1952) Relating to Pre-trial Depositions and Production of Documents.*

"It may well be asked why such an obvious protection to our own economy and the orderly conduct of business upon which that economy rests should not have been in existence long before this. The simple truth is that at no time in the past has any such extra territorial authority been asserted, and it would appear that no government anticipated the possibility that such an improper proceeding would ever be undertaken.

"I need hardly say that when this bill becomes law it will effect only companies operating in Ontario. I recognize that in population Ontario is a very small jurisdiction compared with that of United States. Nevertheless, I trust no citizen of the United States will forget that Canadians are just as proud of their own nationality and just as jealous of their own sovereignty as is any citizen of their own country. I hope that the Government of the United States will see fit to withdraw these proceedings and follow the course which is in keeping with that close international friendship which has been an example to the whole world."

## Sections of the Revised Statutes of the Province of Ontario (Ch. 44, 1950) Relating to Removal of Business Records.

SECTION 1.

"No person shall pursuant to or under or in a manner which would be consistent with compliance with any requirement, order, direction or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside of Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point within Ontario to a point outside of Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report or material in any way relating to any business carried on in Ontario * * *."

SECTION 2.

"(1) Where the Attorney-General or any person having an interest in a business as mentioned in Section 1 has reason to believe that a requirement, order, direction, subpoena as mentioned in Section 1 has been or is likely to be made, issued or given in relation to such business, he may apply to a judge or local judge of the Supreme Court in chambers for an order requiring any person, whether or not such person is named in the requirement, order, direction or subpoena, to furnish an undertaking and recognizance for the purpose of insuring that such person will not violate Section 1 and the judge may make such order as he may deem proper.

"(2) Every person who, having received notice of an application under this section, violates this Act shall be deemed to be in contempt of court and liable to one year's imprisonment.

"(3) Every person required to furnish an undertaking or recognizance who violates this Act shall be in contempt of court and in addition to any penalty provided by the recognizance shall be liable to one year's imprisonment. 1947, c. 10, s. 2."

## Complaint.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE.

SOUTHLAND TRACTORS, INC. and FARM TRACTORS, INC., Plaintiffs,

*v.*

MASSEY-HARRIS-FERGUSON, INC., MASSEY-HARRIS-FERGUSON, LIMITED, and LYNN RUSSELL, Oklahoma City, Oklahoma, Defendants.

No. 2969.

COUNT I.

1. Jurisdiction of this Court is based upon the original jurisdiction of this Court over civil actions or proceedings, arising under any Act of Congress, regulating commerce, or protecting trade and commerce against restraints, monopolies, unfair methods of competition and unfair and deceptive acts or practices in commerce, conferred by 15 U. S. C. A. Section 15, and other applicable statutes. This controversy involves violations of Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U. S. C. A. Sections 1 and 2; Chapter 349, Acts of August 27, 1894, 15 U. S. C. A. Section 8; Chapter 323, Acts of October 15, 1914; and Chapter 592, Acts of June 19, 1936, 15 U. S. C. A. Section 13(e); Section 3, Chapter 323, Acts of October 15, 1914, 15 U. S. C. A. Section 14; Section 7, Chapter 323, Acts of October 15, 1914, 15 U. S. C. A. Section 18, and Chapter 311, Acts of September 26, 1914, 15 U. S. C. A. Section 45(a).

2. Plaintiff, Southland Tractors, Inc., is a corporation organized under the laws of Tennessee, and is engaged generally in the purchase and sale of farm machinery, equipment and implements as a wholesale distributor. Its principal place of business is in Memphis, Tennessee. Since its organization it has purchased and sold tractors and farm machinery, equipment and implements produced by Harry Ferguson, Inc., except for the periods hereinafter mentioned. Its trade territory has been and still is generally West Tennessee, all of Arkansas, a part of Alabama and North Mississippi.

3. Plaintiff, Farm Tractors, Inc., is a corporation organized under the laws of Oklahoma. All of its capital stock is owned by Southland Tractors, Inc. Its business is generally the same as that of Southland Tractors, Inc.; except that its principal place of business is in Oklahoma City, and its trade territory was the State of Oklahoma and a part of the Texas Panhandle.

4. Massey-Harris-Ferguson, Inc., is a corporation organized under the laws of Maryland. It was at all times hereinafter mentioned engaged generally in manufacturing and selling farm tractors, equipment, machinery and implements. It claims a net worth in excess of $52,000,000.00. Its head office is in Racine, Wisconsin. It is a wholly owned corporate subsidiary of Massey-Harris-Ferguson, Limited. It is the outgrowth of the unlawful activities hereinafter set forth.

5. Massey-Harris-Ferguson, Limited, is a corporation organized and existing under the laws of the United Kingdom of Great Britain. It is a gigantic organization engaged, directly and through many subsidiaries, in manufacturing and selling farm tractors, equipment, machinery and implements throughout the entire World. As of October 31, 1954, it claimed total current assets of $156,560,374.00,

and a tangible net worth of $86,956,945.00. Its total World Sales for the year ended October 31, 1955, were $368,049,180.00. It occupies a dominant position in World trade and in the United States.

6. The defendants maintain a place of business and are engaged in business in Memphis, Tennessee, and have representatives in this District upon whom process can be served. (Wherever the word "defendants" is used, corporate defendant is intended unless otherwise indicated.)

If Massey-Harris-Ferguson, Limited, claims that it is not found in this district, then it can be found in the Southern District of New York and in the Eastern District of Michigan and process can be issued out of this Court and served on its agents in those districts and in order to avoid any delay and in order that the ends of justice may be served, process should also be issued and served on its agents in those districts pursuant to Section 22 of Title 15, U. S. C. A.

7. Harry Ferguson is, and for the past several years has been, an outstanding inventive genius; he has invented and developed farm tractors, equipment and implements, which, by reason of their distinctive features, have revolutionized the industry in mechanical farm machinery, equipment and implements; and those features have been and are now protected by patents. About 1948 Harry Ferguson, Inc., began to manufacture the specially designed Ferguson Tractors, and to sell those tractors together with the specially designed equipment, machinery and implements manufactured for it by others. A tractor factory with adequate capacity was built in Detroit, Michigan and the company continued with its plan of marketing its products through distributors, each being allotted designated territory, required to provide adequate capital, to have buildings, carry inventories of product and parts, maintain

service departments, and be financially able to purchase the Ferguson products as they were allotted, ordered, shipped and billed to them. The business was a successful one. Harry Ferguson and Harry Ferguson, Inc., were at all times unalterably committed to marketing Ferguson products through distributors and were unalterably opposed to marketing through company branches.

8. The defendants and their predecessor, Harry Ferguson, Inc., have at all times pertinent, required distributors to operate under written franchises, cancellable at their will upon comparatively short notice, and by the terms of which they have retained and exercised the right to exert economic pressure, and to dominate distributors' businesses and dictate business policies. The defendants and their predecessor have at all pertinent times reserved and exercised the right to approve or reject any dealer selected by a distributor, and have reserved this right with respect to dealers who apply direct for franchises. The defendants acquired and now maintain a complete monopoly over the manufacture, distribution, marketing and selling of all products designed, formerly manufactured and sold by Harry Ferguson, Inc., as well as all other products manufactured by the defendants. This constitutes a large and important segment of interstate commerce.

9. On January 7, 1949, a distributor's sales agreement was entered into by and between Harry Ferguson, Inc., and plaintiff, Southland Tractors, Inc., after the plaintiff had been required to make available approximately $85,000.00 for operating capital. The distributor agreement embraced the territory generally described in Paragraph 2 above; contemplated that plaintiff would purchase products from Harry Ferguson, Inc., procure dealers throughout the designated territory to whom the products would be sold, and who in turn would sell the products at retail to farmers. This plaintiff invested its money, purchased

inventories and, by aggressive and untiring efforts, built a substantial business, which grew continuously until the Fall of 1953. It built a fine dealer organization, with dealers strategically located throughout its trade territory, to whom it sold the farm tractors, machinery and equipment purchased from the defendants and their predecessor. In addition to the exclusive Ferguson line this plaintiff procured distributorships of other lines, including the Gleaner Combine, and has built a large and profitable business with the Gleaner Combine. It marketed the other lines through its dealers with whom it had established close, lasting and valuable business relationships.

10. By the early part of 1953 Harry Ferguson, Inc., was producing a large volume of products, and it was marketing those products through twenty-nine (29) distributorships and two thousand (2,000) retail dealers. The distributors had their own investments, had established business interests, not only in buildings, inventories, tools, etc., but good-will and dealer relationships. The volume done by distributors ran into millions of dollars annually. The volumes of plaintiffs' businesses ran into millions of dollars annually.

11. Massey-Harris Company, Limited, was a British Company, operating out of Canada and Great Britain, with Worldwide manufacture and sale of farm equipment, machinery and implements, but did not have products adequate to compete with the revolutionary Ferguson System products. Its net sales in 1952 exceeded $224,000,000.00.

12. Early in June, 1953, the president of Massey-Harris Company, Limited, met with Harry Ferguson, President of Harry Ferguson, Inc., and discussed business problems, as a result of which the idea was conceived that if Massey-Harris Company, Limited, could acquire all Ferguson patents for farm machinery, equipment and implements,

and the large volume of business built by Ferguson distributors, it could acquire a complete monopoly of all Ferguson System products, especially in the United States, including the businesses built by Ferguson distributors and then owned by them.

13. Pursuant to the purpose and idea as set forth in Paragraph 12, Massey-Harris Company, Limited, in August, 1953, entered into an agreement to acquire all of the capital stock of Harry Ferguson, Inc., as well as all other Ferguson companies (except Ferguson's French company), and thereby acquired absolute domination and control over all Ferguson patents, all manufacturing and marketing policies, together with complete control over Ferguson distributors and their businesses through the distributor franchise agreements. The resultant amalgamation made Massey-Harris-Ferguson, Limited, the second largest manufacturer of farm implements in the World.

Following up that conception, officers and representatives of the two companies, and others who joined the conspiracy, including, but not limited to James S. Duncan, then President of Massey-Harris Company, Limited, Herbert H. Bloom, Cecil B. Milne and Lloyd M. Sweeney, then Vice Presidents of Massey-Harris Company, Limited, or Massey-Harris-Ferguson, Inc., K. S. Spicer, then assistant to the President of Massey-Harris Company, Limited, and Horman G. Klemm and Albert A. Thornbrough, then Vice Presidents of Harry Ferguson, Inc., and J. L. Hooker, now a Director in Massey-Harris-Ferguson, Inc., proceeded forthwith to agree, combine and conspire to monopolize all interstate business in Ferguson products, and to unduly restrain Ferguson distributors and dealers in interstate commerce with the view to first impairing the distributors' ability to compete, and ultimately to acquire all of their businesses and dealers and eliminate the distributors. K. S. Spicer was among the most aggressive and vicious of the conspirators in the destruction of plaintiffs' businesses.

Plaintiffs are informed that he has, right on the eve of the filing of this suit, been transferred by the defendants to Australia. Lynn Russell, who worked under Spicer, joined the conspiracy and made admissions of important facts, which could have been proved by Spicer but for his sudden departure, and he is therefore named as a defendant. Lynn Russell resides in Oklahoma City, Oklahoma, and process can be issued by this Court and served upon him there. C. R. Haggard was then Manager of the Massey-Harris Memphis Branch and still is. He promptly joined the conspiracy, and has been and still is one of the most aggressive and vicious of the conspirators.

14. Massey-Harris Company, Limited, had theretofore marketed its products, through its own branches, direct to dealers, and the desire was irresistible to place distribution of Ferguson products with those branches, and thereby eliminate distributors' legitimate profits.

15. Further conspiring, and furthering the combination and conspiracy then existing as alleged in Paragraphs 12 and 13 above, the defendants, their predecessors, officers, agents and representatives (including branch personnel and franchised dealers), following the actions alleged in Paragraphs 12 and 13—

(a) Wired plaintiffs announcing the amalgamation and stating that they would be continued as distributors under present franchises, and mailed plaintiffs copies of letter and radio news release stating that the two organizations were complementary rather than competitive, and that plans for the future included continued sale and distribution of the new company's products by two distinct dealer contracts or franchises—one covering Massey-Harris tractors, combines and equipment, and the other covering Ferguson System tractors and Ferguson related equipment. That correspondence recommended the cross-franchising of Fer-

guson dealers and Massey-Harris dealers wherever practicable.

(b) Took prompt steps to eliminate certain Ferguson distributors by forcing them to sell out to defendants at cost, and promptly sent representatives to Memphis for conferences with plaintiffs' officials. Defendants' representatives indicated that plaintiffs would be continued as franchised distributors, and recommended that plaintiffs' dealers be also franchised as Massey-Harris dealers, in order that the dealer could carry both lines, and reassured plaintiffs that the lines were to be complementary and not competitive, and that the Ferguson System products would continue to be distributed through the plaintiffs, and requested plaintiffs to cooperate in cross-franchising dealers. At that time the tractors, farm implements and equipment which had up to then been manufactured by Massey-Harris Company, Limited, were not competitive with the Ferguson System tractors, farm implements and equipment manufactured by Harry Ferguson, Inc. The Ferguson System tractors and related implements contained patented features which could not be duplicated or sold or used without infringement and which were not embodied in any tractors or farm implements or equipment then manufactured by Massey-Harris Company, Limited.

Faced with the claimed right of cancellation, and relying implicitly upon the assurances repeatedly made that the lines would be complementary and not competitive, and that Ferguson System products would continue to be distributed through the plaintiffs, plaintiffs agreed to the proposed cross-franchising of dealers, and cooperated in inducing plaintiffs' dealers to enter into franchises with the defendants' branches then handling the line then being manufactured by Massey-Harris Company, Limited, and marketed through those branches. Many of plaintiffs' dealers were reluctant to take on the additional line, whereupon representatives of the defendants, acting in utter

disregard and in violation of the repeated assurances given plaintiffs, and for the purpose of coercing recalcitrant dealers, commenced circulating reports throughout the trade territories of plaintiffs, that all distribution and sale of Ferguson products would soon be taken over by the established Massey-Harris branches, and that eventually there would be no Ferguson line. Within a reasonably short time the defendants had succeeded in cross-franchising almost all of plaintiffs' largest and best dealers, which dealers handled the major portion of plaintiffs' total volume of Ferguson business. The same methods are still being pursued with the view to coercing the remainder of plaintiffs' desirable dealers to submit to cross-franchising, or give up the franchise for the Ferguson line and take a Massey-Harris franchise. A dealer with a Massey-Harris franchise can now obtain the famous Ferguson System tractors and substantially all Ferguson implements painted red, and bearing the name Massey-Harris instead of Ferguson.

(c) The defendants were then manufacturing and marketing a combine, and shortly after the merger the defendants advised plaintiff, Southland Tractors, Inc., that it would have to discontinue the distribution and sale of the Gleaner Combine. Fearing the claimed right and threat of cancellation of its Ferguson franchise, Southland Tractors, Inc., discontinued buying Gleaner Combines, and then and there sacrificed a large and substantial portion of its profitable business. This plaintiff's dealers who were not franchised to handle the Massey-Harris line suffered greatly because this plaintiff had no combine to offer them, and later, in an effort to relieve that intolerable condition, Southland Tractors, Inc., took preliminary steps and entered negotiations with the manufacturer of the Cockshutt Combine, for the distribution of its combine. While those negotiations were in progress the defendants repeatedly made direct and indirect threats to cancel this plaintiff's

Ferguson franchise if it should take on the Cockshutt Combine. All of this plaintiff's business in combines had been in interstate commerce and all its business in combines since the merger would have been in interstate commerce. Many of these threats were communicated to plaintiffs' dealers.

(d) After both plaintiffs had induced substantially all of their large dealers to take on the Massey-Harris line, defendants boldly and brazenly announced that the lines would be competitive, offered the dual or cross-franchised dealers better terms, credit and finance facilities on Massey-Harris products, and brought economic pressure to bear against those dealers to stock and promote Massey-Harris products.

(e) Caused, by exertion of sales pressure, plaintiffs and their dealers to continue to buy Ferguson tractors and implements, and at a time when plaintiffs and their dealers were carrying large inventories, commenced manufacturing the Ferguson TO-35 Tractor, with slight changes, retaining all of the distinctive, advanced and exclusive features of the Ferguson System, painted it red, and labeled it as a Massey-Harris production, and extravagantly advertised it nationally as the Massey-Harris "Miracle." The defendants promptly stocked this tractor in their branches, and a line of duplicated Ferguson System implements, promoted it to dealers and farmers, brought economic pressure to bear on plaintiffs' cross-franchised dealers to stock it and promote it, insisted that dealers give firm orders for a minimum number of the new tractor, which defendants named MH-50, and pushed it in competition with plaintiffs' dealers who did not hold Massey-Harris franchises. Defendants have thereby so impaired plaintiffs' and their dealers' ability to compete that they can no longer operate at a profit. Most dealers have since operated their Ferguson businesses at a loss; some have given

up, and others are liquidating with a view to getting out with the least possible loss.

(f) Refused to furnish plaintiffs and their dealers with sufficient implements to afford them a full line with which to compete, while furnishing the branches with a line of duplicated Ferguson implements, labeled and to be sold as Massey-Harris products.

(g) On new implements introduced by the defendants not three-point mounted, which are distributed through the branches, and offered to the Ferguson distributors for distribution, the defendants offer Massey-Harris dealers, including combination dealers, far more liberal credit terms than are made available by the defendants to the plaintiffs and their dealers in connection with the distribution of these implements, thus making it impossible for plaintiffs to distribute such implements in competition with the Massey-Harris branches.

(h) When plaintiffs complained to defendants that defendants' activities and practices if continued would cause plaintiffs to lose their business with combination dealers, the defendants took the position that plaintiffs would have to rebuild their dealer organization to replace their cross-franchised dealers lost to the branches.

Defendants have, by the acts herein enumerated and others, substantially eliminated the marketing of Ferguson products, and monopolized the entire market for both lines.

16. Harry Ferguson, Inc., in 1953, encouraged and induced Southland Tractors, Inc., and other , to take on the distributorship in Oklahoma City, Oklahoma, and to invest $200,000.00 in the venture, as a result of which Farm Tractors, Inc., was organized, a lease with high rentals executed, and a large amount of money invested in inventory, tools and equipment, service department and in the field to develop dealer representation. Plaintiffs entered

upon this venture, relying upon the false assurance of Harry Ferguson, Inc., that marketing and manufacturing of Ferguson products would continue as before, while the negotiations being conducted with respect to the then contemplated acquisition of Harry Ferguson, Inc., by Massey-Harris Company, Limited, were secretly withheld from the plaintiffs. Almost immediately Farm Tractors, Inc., was confronted with all the problems and activities set forth above, and other unfair, deceptive and restraining competitive practices, as a result of which Farm Tractors, Inc., was never able to effectively conduct its business so as to realize the earnings and profits to which it was entitled, and which defendants or their predecessor represented would be made and earned.

17. Prior to the amalgamation Harry Ferguson, Inc., had not manufactured and put on the market a tractor larger than the TO-35, which was in size what is commonly known as a two-plow tractor. However, prior to the amalgamation Harry Ferguson had designed and built a larger tractor embodying the distinctive advanced and patented Ferguson System features, comparable in size to what is commonly known as the four-row tractor. The future advent of that tractor and a line of related implements with the patented Ferguson features had been highly publicized and all Ferguson distributors and dealers had been advised to increase their capital and operating facilities, and urged to take firm orders for the new tractor. Hundreds and probably thousands of firm orders were executed and delivered. The defendants had not been able to build a tractor which could have met the competition of the new large Ferguson System tractor, and they well knew that their existing line of tractors of comparable size and capacity could not compete with it, and that their implements could not compete with those to be provided for the new tractor. Having acquired all Ferguson patents and rights to manufacture Ferguson System tractors and implements, the

defendants shelved that tractor and line of implements, and have never permitted them to be marketed, solely to restrain and suppress competition, and to enable them to dispose of and to foist upon the farmer four-row tractors now being manufactured by them, which are far inferior in quality, efficiency, performance, and economy to the promised new Ferguson tractor; or, they are purposely delaying the production of the new Ferguson System tractor and related implements until they can absorb the Ferguson System line into the Massey-Harris line, and thereafter market all products under the Massey-Harris name. Shortly after the merger distributors and dealers were falsely assured that tooling had been started, and before and since that time defendants have periodically given false assurances to plaintiffs and their dealers that deliveries would soon be made of the said tractor and implements. These false representations and assurances caused the plaintiffs and their dealers to expect substantial increases in their businesses, and were a controlling and compelling factor in inducing the plaintiffs to take on the franchise for the Oklahoma City Territory, investing their money in it, and developing a dealer organization. If the large Ferguson System tractor and related implements are ever produced, the defendants will market them under the colors and name of Massey-Harris through their branches, in direct competition to Ferguson distributors, with resultant damage to plaintiffs and their dealers, and ultimately as the exclusive Massey-Harris products.

18. Following the agreement to acquire the capital stock of Harry Ferguson, Inc., by Massey-Harris Company, Limited, in 1953, the defendant Massey-Harris-Ferguson, Limited, carried on a part or all of its business in the United States through Harry Ferguson, Inc., and the Massey-Harris Company (both of Racine, Wisconsin), as wholly owned subsidiaries. About September 1, 1954, those two subsidiaries were merged into the present Massey-Harris-

Ferguson, Inc., one of the defendants named herein. This latter company is a wholly owned subsidiary of Massey-Harris-Ferguson, Limited. Each of the defendants has assumed responsibility for all of the acts and liabilities of the other companies, and of their officers and agents.

19. Farm tractors and implements are vital to American agriculture. Any restraint on competition in any part of the industry prejudicially affects the public interest. The defendants' businesses of manufacturing and marketing farm equipment, machinery and implements is interstate commerce. Substantially all manufactured products are shipped in interstate commerce from the factories to every State in the Union. Plaintiffs' businesses are substantially all in interstate commerce; all products handled by them are shipped from other States and Canada to plaintiffs in Memphis and Oklahoma City, and to their dealers in the States in their trade territories.

20. The acts of the defendants and their predecessors herein complained of have unreasonably restrained and are unreasonably restraining competition in interstate commerce, and are in violation of 15 U. S. C. A. Section 1.

21. The monopoly herein complained of violates 15 U. S. C. A. Section 2.

22. A substantial part of the defendants' products have been and are imported by them from foreign countries into the United States, with the intent that such goods shall be sold in restraint of trade and competition in interstate commerce, in violation of 15 U. S. C. A. Section 8.

23. The defendants and their predecessors have, during the period from June, 1953, to date, continuously committed acts prohibited by 15 U. S. C. A. Section 13 (3).

24. The defendants and their predecessors have continuously violated the prohibitions of 15 U. S. C. A. Section 14, by restraining plaintiffs from handling and dealing in farm machinery, equipment and implements, manufactured and sold by defendants' competitors, while withholding from plaintiffs defendants' comparable products and merchandising the same through their branches.

25. The defendants have by their acts complained of in Paragraphs 12 through 18, violated the prohibitions enacted in 15 U. S. C. A. Section 18.

26. The defendants and their predecessors have, continuously since August, 1953, by the activities herein alleged, and especially those alleged in Paragraphs 15 through 17, violated the provisions of 15 U. S. C. A. Section 45(a).

27. The business of plaintiff, Southland Tractors, Inc., was well-established and growing. It has sustained and will sustain losses and damages occasioned by the unlawful acts of the defendants, their predecessors, officers and agents, in excess of $2,500,000.00. In addition thereto, this plaintiff is entitled to and claims an allowance for costs and expenses of suit and reasonable attorney fees, to be allowed by this Court pursuant to 15 U. S. C. A. Section 15.

28. The business of plaintiff Farm Tractors, Inc., was well-established, and but for the unlawful practices of the defendants its potential was greater than that of Southland Tractors, Inc. Its business has now been totally destroyed. The unlawful activities of the defendants have caused this plaintiff to operate at a loss for the past several months, and have made it impossible for this plaintiff to continue in business. Within the past sixty (60) days this plaintiff received a firm offer for the purchase of all of its physical assets at fair cash market value, the purchaser to assume a burdensome lease. The offer was conditioned only upon the

approval and consent of Massey-Harris-Ferguson, Inc. That defendant refused to give its consent and the sale was not consummated. Massey-Harris-Ferguson, Inc., has since agreed to purchase certain of the physical assets, but has refused to buy the furniture, fixtures, bins, and other inventory, equipment and assets, and has refused to assume the lease. It has sustained past, present and future losses and damages occasioned by the unlawful acts of the defendants, their predecessors, officers and agents in excess of $3,150,000.00. This plaintiff will suffer an additional loss in the liquidation of its remaining assets and by reason of its burdensome lease. In addition thereto, this plaintiff is entitled to and claims an allowance for costs and expenses of suit and reasonable attorneys fees, to be allowed by this Court pursuant to 15 U. S. C. A. Section 15.

29. (a) The continued marketing of the Ferguson TO-35 tractor and Ferguson implements and parts under the Massey-Harris trade name and color will soon destroy Southland Tractors, Inc., and its dealers, as well as Farm Tractors, Inc., dealers in the Oklahoma and Texas territory; and the marketing of the new four-row Ferguson tractor and related implements as a Massey-Harris product will deprive all those named herein just and equitable profits to which they will be entitled; and all this will cause those described in this paragraph irreparable injury and damage unless restrained and enjoined by decree of this Court.

(b) Continued threats by the defendants to cancel the franchises of Southland Tractors, Inc., and its dealers if they buy and sell farm implements, machinery and equipment not manufactured by defendants will cause this plaintiff and its dealers irreparable injury and damage unless restrained and enjoined by decree of this Court.

(c) All of the activities described in subparagraphs (a) and (b) will deprive Farm Tractors, Inc., dealers of just

and equitable profits and will cause them irreparable damage, unless those activities be enjoined by decree of this Court.

WHEREFORE, plaintiff Southland Tractors, Inc., demands judgment against the defendants for the amounts above claimed, and Farm Tractors, Inc., demands judgment against the defendants for the amounts above claimed, and that the damages awarded to each be trebled. Southland Tractors, Inc., prays for injunctive relief prohibiting the unlawful activities set forth in Paragraph 29(a) and (b), and that defendants be enjoined from cancelling its franchise or the franchises of its dealers, or those of Farm Tractors, Inc.

Plaintiffs demand a jury to try the issues when joined.

WILLIAM A. PERCY
Attorney at Law
Columbian Mutual Tower
Memphis, Tennessee

LOWELL W. TAYLOR
Attorney at Law
Commerce Title Building
Memphis, Tennessee
Attorneys for Plaintiffs.

*Complaint.*

COUNT II.

1. Jurisdiction is founded on diversity of citizenship and amount.

2. Each and every allegation in Paragraphs 2 through 18, and 27 and 28, are re-alleged and incorporated herein by reference.

WHEREFORE, plaintiff Southland Tractors, Inc., demands judgments against the defendants for the amounts of compensatory damages claimed in Paragraph 27, and for punitive damages in twice those amounts, and Farm Tractors, Inc., demands judgment against the defendants for the amount of compensatory damages claimed in Paragraph 28, and for punitive damages in twice that amount.

Plaintiffs demand a jury to try the issues when joined.

WILLIAM A. PERCY
Attorney at Law
Columbian Mutual Tower
Memphis, Tennessee

LOWELL W. TAYLOR
Attorney at Law
Commerce Title Building
Memphis, Tennessee
Attorneys for Plaintiffs.

**Motion to Quash Returns and Purported Service of Summons and Complaint and to Dismiss Complaint.**

Comes the defendant Massey-Harris-Ferguson Limited, appearing specially for the purpose of making this motion and for no other purpose, and moves the court upon the summons and complaint herein and the annexed affidavits of Lee J. Wolf, C. Norman Appleton, V. N. Detling and Kenneth G. House for an order quashing the purported service, and the various returns thereof of a summons and complaint in this cause upon this defendant, Massey-Harris-Ferguson Limited, and dismissing the complaint as to this defendant upon the grounds that this defendant, at the time of institution of this suit and at all times since, was and is a corporation chartered under the laws of the Dominion of Canada; it was not and is not an inhabitant of the Western District of Tennessee; it was not and is not transacting business in the Western District of Tennessee; and it was not and is not either actually or legally present or found in the Western District of Tennessee and accordingly it is not subject to suit in the Western District of Tennessee nor to service of process in this cause.

s/Cooper Turner, Jr.
Attorney for Defendant

## Affidavit of Lee J. Wolf in Support of Motion to Quash and Vacate Service.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

SOUTHLAND TRACTORS, INC. and FARM TRACTORS, INC.,
Plaintiffs,

*v.*

MASSEY-HARRIS-FERGUSON, INC., MASSEY-HARRIS-FERGUSON, LIMITED, and LYNN RUSSELL,
Defendants.

STATE OF WISCONSIN }
COUNTY OF RACINE } ss.:

LEE J. WOLF, being duly sworn, deposes and says:

1. I am the Vice President, Administration, and Treasurer of Massey-Harris-Ferguson, Inc. (herein sometimes called "the American Company") and am fully familiar with the business and operations of this company. I make this affidavit in support of the motion of Massey-Harris-Ferguson, Limited (herein sometimes called "the Canadian Company") to vacate the service of the summons and to dismiss the complaint herein on the grounds that the Canadian Company is not subject to process in the Western District of Tennessee.

2. The American Company is a Maryland corporation which commenced operations on February 22, 1928 under

*Affidavit of Lee J. Wolf in Support of Motion to Quash and Vacate Service.*

the name of The Massey-Harris Company. Its name was changed to Massey-Harris-Ferguson Inc. in 1954. It is qualified to do business in every state of the United States including the state of Tennessee and is therefore subject to process here.

3. The American Company has been at all times a wholly owned subsidiary of the Canadian Company, but it has been independently operated at all times since its organization. Its business and operations are conducted by a Board of Directors and Officers, a majority of whom are residents of the United States. Its main offices are located at Racine, Wisconsin from which point the activities of the company's five manufacturing plants are directed. The company operates two plants at Racine, Wisconsin for the manufacture of tractors, cultivators, planters, bedders and listers. The company also operates a plant at Batavia, New York for the manufacture of combines, corn pickers, harvesters and forage blowers. It maintains another plant at Fowler, California for the manufacture of harrows, cultivators and listers and a tractor assembly plant at Detroit, Michigan. In addition to its manufacturing and assembly operations carried on at these five plants, the American Company purchases from independent suppliers and manufacturers throughout the United States.

4. The American Company also maintains a national distribution organization. Its products are distributed in the United States through 19 branches having 2,253 franchised dealers. In addition, the company presently has agreements with 18 independent distributors having 1,874 franchised dealers. The Canadian Company has no agreements or relationships with these branches, distributors, or dealers. The plaintiff corporations were distributors for Harry Ferguson, Inc. In 1953, following the merger of the Massey-Harris and Ferguson companies, the plain-

tiff corporations became distributors for the American Company. A copy of each of the agreements with the plaintiff corporations is annexed hereto as Exhibits "A" and "B".

5. Pursuant to the terms of these Agreements, the plaintiffs from time to time have placed orders for tractors and farm implements with the American Company. These orders have been accepted or rejected by the American Company at the main offices in Racine, Wisconsin. At the direction of the company's offices in Racine, shipments of tractors and farm implements have been made from time to time to the plaintiff corporations.

6. On information and belief the plaintiffs have never placed orders with the Canadian Company and the Canadian Company has made no sales to the plaintiffs. All of plaintiffs' business relations are and have been with the American Company.

7. The American Company has never acted as the agent for the Canadian Company. It has at all times acted solely in its own name and for its own account in all of its manufacturing, assembly, sales, procurement and advertising activities.

/s/ LEE J. WOLF

Sworn to before me this 4th
day of September, 1956.

/s/ MYRTLE M. CHECKLA
Notary Public

Notary Public, Racine County, Wisconsin
My Commission Expires April 13, 1958

(SEAL)

## Affidavit of C. Norman Appleton in Support of Motion to Quash and Vacate Service.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

SOUTHLAND TRACTORS, INC. and FARM TRACTORS, INC.,
Plaintiffs,

*v.*

MASSEY-HARRIS-FERGUSON, INC., MASSEY-HARRIS-FERGUSON, LIMITED, and LYNN RUSSELL,
Defendants.

DOMINION OF CANADA }
PROVINCE OF ONTARIO } ss.:

C. NORMAN APPLETON, being duly sworn, deposes and says:

1. I am a resident and citizen of Canada and I am the Vice-President and Secretary of Massey-Harris-Ferguson Limited (herein sometimes called the "Canadian Company") and am familiar with its business and operations. I am advised that on August 21, 1956 the summons and complaint in this action purportedly were served in Memphis, Tennessee upon V. N. Detling who is not an employee of Massey-Harris-Ferguson Limited but who is an employee of the American subsidiary, Massey-Harris-Ferguson Inc. (herein sometimes called the "American Company"). I am advised that on August 24, 1956 service was made in New York City of the said summons and complaint on

*Affidavit of C. Norman Appleton in Support of Motion to Quash and Vacate Service.*

Kenneth G. House, accountant of the New York Agency of The Canadian Bank of Commerce. I am advised that thereafter on August 27, 1956 service was made in Detroit, Michigan, upon Herman Klemm, who is an officer of both corporate Defendants herein.

2. The complaint herein refers to Massey-Harris-Ferguson Limited as a corporation organized and existing under the laws of the United Kingdom of Great Britain. This is incorrect. Massey-Harris-Ferguson Limited is a Canadian corporation. The Canadian Company of which I am an officer owns all of the stock of the American Company and is the parent corporation thereof.

3. I make this affidavit in support of the motion of the Canadian Company to vacate the service of the said summons as against it on the grounds that the Canadian Company has not done and is not now doing business in the Western District of Tennessee and is therefore not subject to process in that District. On the basis of my experience with the Canadian Company which extends over a period of many years and after consulting available records and personnel, to the best of my knowledge and belief this is so because:

(a) the Canadian Company was never and is not now a resident of the Western District of Tennessee;

(b) the Canadian Company was not and is not now qualified to do business in the State of Tennessee;

(c) the Canadian Company has never maintained any office or place of business, or kept any books or records in the Western District of Tennessee;

(d) the Canadian Company has never held meetings of its board of directors or stockholders in the

*Affidavit of C. Norman Appleton in Support of Motion to Quash and Vacate Service.*

Western District of Tennessee and none of its officers or directors are residents there;

(e) the Canadian Company has never maintained any bank accounts in the Western District of Tennessee;

(f) the Canadian Company has never authorized or paid for any listing in any directories published in the Western District of Tennessee;

(g) the Canadian Company has never done any advertising in any media published in the Western District of Tennessee;

(h) the Canadian Company has never solicited any orders or made any sales in the Western District of Tennessee nor has it made any collections of any accounts there;

(i) the Canadian Company has never appointed anyone as its agent in the Western District of Tennessee for any purpose whatsoever.

4. The Canadian Company was incorporated in Canada by letters patent dated July 2, 1891 and has operated continuously in Canada since that date. Its business is conducted by a board of directors and officers a majority of whom are residents of Canada.

5. The Canadian Company is a manufacturer and supplier of tractors, farm implements and related equipment. The main offices of the Canadian Company and its corporate books and records are located in Toronto, Ontario. It owns and operates five plants in Canada where tractors, combines, hay balers, cultivators, discs, drills, mowers, rakes, loaders, manure spreaders, harrows, plows and other farm implements are manufactured.

*Affidavit of C. Norman Appleton in Support of Motion to Quash and Vacate Service.*

6. The Canadian Company has operating and manufacturing subsidiaries in the United States and in various other countries. Each of such subsidiary companies has been and is operated and managed through its own board of directors and officers.

7. The Canadian Company distributes its products in Canada through branches. None of the activities of the Canadian Company, including manufacturing, assembly, sales or advertising, are carried on in the Western District of Tennessee. The Canadian Company has never made any sales to the Plaintiffs herein. None of the Canadian Company's records, books of account or bank accounts have been or are located in and no personnel of the Canadian Company has been or is resident in the Western District of Tennessee. The Canadian Company has no franchises or agreements with distributors or dealers for the sale or distribution of its products in the United States and, specifically, no franchises or agreements with the Plaintiffs herein. The American Company does not act as agent of the Canadian Company.

C. N. APPLETON

Sworn before me at the City of Toronto
in the Province of Ontario this
6th day of September, 1956.

J. THOMPSON
A Notary Public
in and for the Province of Ontario
My Commission is for life

Notarial Seal

## Affidavit of V. N. Detling in Support of Motion to Quash and Vacate Service.

STATE OF TENNESSEE }
COUNTY OF SHELBY } ss.:

V. N. DETLING, being duly sworn, deposes and says:

1. I am the Assistant Branch Manager of the Memphis branch of Massey-Harris-Ferguson, Inc. My authority and duties are to assist the Branch Manager in the conduct of the affairs of the Memphis branch of that company, which branch has general supervision of the sales of the company's equipment in the Southeast area of the United States.

2. I am not and never have been an officer, agent or employee of Massey-Harris-Ferguson Limited and I am not an Assistant Branch Manager of that company as stated in the return of John T. Williams, U. S. Marshal.

3. On the 21st of August, 1956, I received a summons and complaint in this action from a Deputy United States Marshal. I did not accept service of these documents on behalf of Massey-Harris-Ferguson Limited nor did I state that I so received service of the documents.

4. I am fully familiar with all of the business operations of Massey-Harris-Ferguson, Inc. in Tennessee, and the activities of other farm machinery companies in the area. Massey-Harris-Ferguson Limited does not have an office in Tennessee, nor has it at any time had an agent or representative in that State, nor has it transacted business of any kind in that State.

V. N. DETLING

Sworn to before me this 7 }
day of September, 1956. }

M. K. MARCHILDON
Notary Public

My Commission Expires June 22-1960

## Affidavit of Kenneth G. House in Support of Motion to Quash and Vacate Service.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

KENNETH G. HOUSE, being duly sworn, deposes and says:

1. I am an Accountant of the New York Agency of The Canadian Bank of Commerce, 20 Exchange Place, New York, New York.

2. On August 24, 1956, purported service of a summons and complaint in the above entitled action was made on me.

3. Neither I nor the New York Agency of The Canadian Bank of Commerce has at any time been appointed or acted as the agent for service of process or any other purpose for Massey-Harris-Ferguson Limited. I was not authorized to receive service of process on said corporation.

4. Massey-Harris-Ferguson Limited has maintained for some years a current bank account with the New York Agency of The Canadian Bank of Commerce, and we have from time to time honored drawings against this account. In addition, The Canadian Bank of Commerce Trust Company, an affiliate of The Canadian Bank of Commerce, has acted as transfer agent with respect to the stock of Massey-Harris-Ferguson Limited. This is and has been our only relationship with Massey-Harris-Ferguson Limited.

5. I am not, and was not on August 24, 1956, an officer of The Canadian Bank of Commerce Trust Company.

/s/ KENNETH G. HOUSE

Sworn to before me this 6th day of September, 1956.

/s/ FRANK J. MURPHY
Notary Public

FRANK J. MURPHY
Notary Public, State of New York
No. 31-8068900
Qualified in New York County
Commission Expires March 30, 1958

[SEAL]